SUPREME COURT, U. S.

APPENDIX

FILED
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JOHN F. DAVIS, CLERK

# SUPREME COURT OF THE UNITED STATES

October Term, 1967

## No. 410

GARY DUNCAN, APPELLANT,

*vs.*

STATE OF LOUISIANA, APPELLEE

*APPEAL FROM THE SUPREME COURT OF LOUISIANA*

**FILED JULY 24, 1967**

**PROBABLE JURISDICTION NOTED OCTOBER 9, 1967**

# SUPREME COURT OF THE UNITED STATES

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No. 410

GARY DUNCAN, APPELLANT,

*vs.*

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BILL OF INFORMATION—Filed December 5, 1966

No. 14643

Twenty-Fifth Judicial District Court

Parish of Plaquemines

# The State of Louisiana

VS.

GARY DUNCAN

INFORMATION FOR

SIMPLE BATTERY

UNDER 1950 R.S. 14:35

LEANDER H. PEREZ, JR.
District Attorney Twenty-Fifth Judicial District

A TRUE COPY

Clerk of Court, Ex-Officio Recorder, Etc.

Plaquemines Parish

THE STATE OF LOUISIANA
Twenty-Fifth Judicial District S.S.

LEANDER H. PEREZ, JR., District Attorney for the Twenty-Fifth Judicial District, State of Louisiana, who in the name of and by the authority of said State, prosecutes in this behalf, in proper person, comes into the Twenty-Fifth Judicial District Court, in and for the Parish of Plaquemines, and gives the said Court here to understand, and be informed, that one GARY DUNCAN late of the Parish of Plaquemines, on the 18th day of October, 1966 with force and arms in the parish aforesaid, and within the Jurisdiction of the Twenty-Fifth District Court, for said Parish did commit a battery upon one Herman M. Landry, Jr., by striking him with his hand, without his consent, Contrary to the form of the Statute of the State of Louisiana, in such cases made and provided, and against the dignity and peace of the same.

/s/ Darryl W. Bubrig, Jr.
Assistant District Attorney,
Twenty-Fifth Judicial
District Court.

Filed DEC 5 1966

E. D. Rhoades Jr. Clerk

Arraigned DEC 7 1966

Plea NOT GUILTY

Arrgn. Contd. to

Fixed for Trial 12/21/66

12/19/66

Trial Contd. to 1/25/67

Verdict GUILTY

1/67 Sentence Deferred to 2/1/67

2/1/67 Sentence $150.00 & costs and Sixty days in Parish Prison; additional twenty days in event fine & costs are not paid.

B. W. Issued

Amt. of Bond

Bondsman

Atty. for Def. Robert F. Collins
Miles R. Douglas
Reuben A. Lee

STATE OF LOUISIANA
TWENTY-FIFTH JUDICIAL DISTRICT COURT

[Title omitted]

DEMAND FOR TRIAL BY JURY—
JANUARY 25, 1967

Gary Duncan, made defendant herein, hereby demands trial of this cause by jury. Defendant is charged with simple battery under L.S.A.-R.S. 14:35. The maximum sentence that may be imposed upon conviction of this charge is two years imprisonment. While there is no express provision of Louisiana law for a jury trial on a charge of simple battery, the right to trial by jury where the sentence may be in excess of six months is secured by the Sixth and Fourteenth Amendments to the United States Constitution, as construed by the United States Supreme Court in *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966).

Respectfully submitted,

ROBERT F. COLLINS
NILS R. DOUGLAS
RICHARD B. SOBOL
2211 Dryades Street
New Orleans, Louisiana 70113
By Robert F. Collins
Attorneys for Defendant

Dated: January 25, 1967

*Duly sworn to by Robert F. Collins and Nils R. Douglas, jurat omitted in printing.*

STATE OF LOUISIANA
TWENTY-FIFTH JUDICIAL DISTRICT COURT
PARISH OF PLAQUEMINES

[Caption omitted]

BILL OF EXCEPTION NO. I—Filed February 1, 1967

Be it remembered that before the trial of the above numbered and entitled cause, the defendant, by his counsel, did file a "Demand for Trial by Jury", as follows:

[Caption omitted]

Gary Duncan, made defendant herein, hereby demands trial of this cause by jury. Defendant is charged with simple battery under L.S.A.-R.S. 14: 35. The maximum sentence that may be imposed upon conviction of this charge is two years imprisonment. While there is no express provision of Louisiana law for a jury trial on a charge of simple battery, the right to trial by jury where the sentence may be in excess of six months is secured by the Sixth and Fourteenth Amendments to the United States Constitution, as construed by the United States Supreme Court in *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966).

Respectfully submitted,

ROBERT F. COLLINS
NILS R. DOUGLAS
RICHARD B. SOBOL
2211 Dryades Street
New Orleans, Louisiana 70113

By Richard B. Sobol

Attorneys for Defendant

Dated: January 25, 1967

Date Filed: February 1, 1967
C. R. Fouteuller, Deputy Clerk

The Court denied said motion and the defendant by his counsel did then and there in open court reserve the bill of exception making part thereof the demand for a jury trial, the arguments of counsel, and the ruling of the Court.

There being error to the prejudice of the defendant, the defendant files this formal bill of exception and tenders the same to the Court for signing pursuant to statute, which is done accordingly this 1st day of February, 1967.

EUGENE E. LEON,
JUDGE

---

STATE OF LOUISIANA
TWENTY-FIFTH JUDICIAL DISTRICT COURT
PARISH OF PLAQUEMINES

[Caption omitted]

NOTICE OF INTENTION TO APPLY
FOR A WRIT OF CERTIORARI–
Filed February 1, 1967

Defendant hereby gives notice, pursuant to Rule 12, Section 2 of the Rules of the Supreme Court of Louisiana, of his intention to apply to that Court for a writ of certiorari to review the judgment of this Court in the above captioned matter. Defendant moves that this Court set the return date for the application on February 13, 1967, and that the appearance bond in this cause be continued as bond pending the decision of the Supreme Court on the application. Alterna-

tively, defendant moves that other bond be established pending the filing of the application.

Respectfully submitted,

ROBERT F. COLLINS
NILS R. DOUGLAS
RICHARD B. SOBOL
2211 Dryades Street
New Orleans, Louisiana 70113
By Robert F. Collins
Attorneys for Defendant

Dated: February 1, 1967

---

STATE OF LOUISIANA
TWENTY-FIFTH JUDICIAL DISTRICT COURT
PARISH OF PLAQUEMINES

[Caption omitted]

ORDER—Filed February 1, 1967

The return date to file an application for a writ of certiorari in the Supreme Court of Louisiana is set on February 13, 1967. The appearance bond is cancelled and the new bond shall be fixed at $1500.00 pending the decision of the Supreme Court on the application.

EUGENE E. LEON

Dated: February 1, 1967
Pointe-a-la-Hache, Louisiana

---

EXTRACT FROM MINUTES OF COURT–
WEDNESDAY, FEBRUARY 1st, 1967

PURSUANT TO ADJOURNMENT THE COURT MET:
PRESENT: HON. EUGENE E. LEON, JR., JUDGE, DIV. "B".
HON. LEANDER H. PEREZ, JR., DISTRICT ATTORNEY
HON. DARRYL W. BUBRIG, SR., ASSISTANT
DISTRICT ATTORNEY

No. 14643

STATE OF LOUISIANA VS. GARY DUNCAN

Simple Battery

This matter was called.

Present: Leander H. Perez, Jr., District Attorney
Darryl W. Bubrig, Sr., Assistant District Attorney
Richard B. Sobol, Attorney for Defendant
Gary Duncan, Defendant.

Mrs. Del Norte M. Lancaster was duly sworn as the Official Court Reporter.

Defense Counsel announced to the Court that the accused was ready for sentencing, however, before sentencing, he would request a suspended sentence and presented statement in support thereof.

The Court answered counsel and then sentenced the said Gary Duncan to pay a fine of $150.00 and costs and serve Sixty days in Parish Prison; additional twenty days in the event fine and costs are not paid.

Defense Counsel presented to the Court his Bill of Exception No. 1 to the Court's previous ruling on the demand for trial by jury. Defense Counsel further presented to the Court his Notice of Intention to Apply for a Writ of Certiorari and the Court signed the Order fixing the return day in the Supreme Court of Louisiana for February 13, 1967. The Court then ordered the appearance bond cancelled and the

new bond fixed in the sum of $1500.00 pending the decision of the Supreme Court of Louisiana on the application.

Prisoner remanded.

AND THE COURT WAS ORDERED ADJOURNED:

---

SUPREME COURT OF LOUISIANA

Docket No. 48,573

STATE OF LOUISIANA

v.

GARY DUNCAN,
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE TWENTY-FIFTH JUDICIAL DISTRICT COURT

[Index omitted]

Statement of the Case

Petitioner seeks review of his conviction of Simple Battery (L.S.A.-R.S. 14:35) in the Twenty-Fifth Judicial District Court.

On the afternoon of October 18, 1966, petitioner, a nineteen year old Negro, was driving south on Highway 23 in Plaquemines Parish. Near Boothville-Venice High School he saw his two young cousins along the shoulder of the road confronted by four white boys. The Negro youths had transferred earlier in the month to the formerly all-white Boothville-Venice school, pursuant to an order of the United States District Court for the Eastern District of Louisiana. The Negro boys had been the victims of threats and violence during their enrollment at the school.

Petitioner stopped his car to see what was happening. After exchanging a few words with the Negro and the white boys, he told his cousins to get into his car. Herman Landry, Jr., one of the white boys present, muttered to the petitioner, "You must think you're tough." It is at this point that the battery against Landry is alleged to have been committed. At trial three of the white boys and a white man who had been standing 250 feet away at the time of the incident testified that petitioner slapped Landry on the arm. Petitioner and his cousins testified that petitioner had lightly nudged Landry on the elbow and told him to go on home.

The Court resolved the conflicting testimony in favor of the State and found that petitioner had struck Landry with "force or violence" within the meaning of L.S.A.-R.S. 14: 33. On February 1, 1967, the Court signed petitioner's one bill of exception and sentenced him to 60 days imprisonment and $150 fine.

Although petitioner had demanded trial by jury, trial was to the court.

## Grounds on Which the Supervisory Jurisdiction of This Court Is Invoked

Immediately after sentence on February 1, 1967, petitioner filed a Notice of Intention to Apply for a Writ of Certiorari, pursuant to Rule 12, Section 2 of the Rules of the Supreme Court of Louisiana. The jurisdiction of this Court is invoked under Article 7, Section 2 of the Constitution of the State of Louisiana. The District Court set bond at $1500 and set February 13, 1967 as the return date for filing this petition.

## Issues and Questions of Law Involved

1. Does the denial of a jury trial for a crime punishable by two years in prison contravene petitioner's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States?

2. In the particular circumstances of this case, does the denial of a jury trial contravene petitioner's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States?

## Assignment of Error

The trial Court erred in denying petitioner's demand for a trial by jury. (Bill of Exception No. 1).

## Argument on Assignment of Error

### Petitioner Was Deprived of a Trial by Jury in Violation of the Sixth and Fourteenth Amendments to the United States Constitution

At the commencement of the trial, petitioner demanded trial by jury. The Court refused the demand on the ground that Louisiana law specifically denies the right to jury trial to a person accused of a misdemeanor (Article 779 of the Code of Criminal Procedure). Misdemeanor is defined in Article 933 as any offense other than one punishable by death or imprisonment at hard labor. An examination of the particular circumstances out of which the arrest of petitioner arose, and the subsequent circumstances at trial makes clear the denial of a trial by jury composed of a fair representation of the community violated petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution.

In the summer of 1966, Plaquemines Parish was ordered by the Federal Court to desegregate its public school system. Pursuant to this order, petitioner's two cousins transferred to the formerly all-white Boothville-Venice school. During the early days of the fall semester, white students who remained in the school challenged, abused, and intimidated these and other Negro students.

On October 18, 1966—in the heat of this racially tense climate—petitioner's cousins missed the schoolbus and were walking home along Highway 23. Four white boys from

the school saw them, crossed the road to confront them, and exchanged threatening words with them. At this point, petitioner drove by and stopped his car. After speaking to his cousins and to the white boys, petitioner thought it best that he drive the Negro boys home. The Court found that after petitioner's cousins got into his car, petitioner committed a simple battery against Herman Landry, Jr., one of the white boys. As stated above, the Negro boys testified at the trial that the touching by petitioner was a light nudge and not with "force or violence" as required in L.S.A.-R.S. 14:33.

It is manifest that the circumstances attendant to the arrest of petitioner on the charge of battery were racially oriented. These same racial overtones were expressed at the trial; petitioner presented only Negro witnesses in aid of his defense while the prosecution's witnesses were all white.

Certainly, in this atmosphere, only a jury composed of a fair representation of the community could impartially assess the evidence and render a just verdict.

Under Louisiana law simple battery is punishable by two years imprisonment, L.S.A.-R.S. 14:33. The Sixth and Fourteenth Amendments to the United States Constitution guarantee trial by jury on this charge. In *Cheff v. Schnackenberg*, 384 U.S. 373 (1966), the United States Supreme Court held that the Sixth Amendment bars a federal court from imposing a sentence in a contempt proceeding in excess of six months without affording the accused a trial by jury. Since contempt proceedings have historically involved lesser procedural safeguards to the accused than other criminal proceedings, it is manifest that at least the rule articulated in *Cheff* applies in non-contempt criminal proceedings.

The guarantees of the Sixth Amendment to the United States Constitution apply to the States by virtue of the due process clause of the Fourteenth Amendment. See *Gideon* v. *Wainwright*, 372 U.S. 353 (1963) (right to counsel); *Pointer* v. *Texas*, 380 U.S. 400 (1965) (right to confrontation of witnesses). Article 779 of the Louisiana Code of

Criminal Procedure is therefore unconstitutional on its face, insofar as it denied petitioner the right to a jury trial in this case.

Because he was deprived of trial by jury, petitioner was convicted in violation of due process of law secured by the Fourteenth Amendment.

## Conclusion

The question presented in this case is one of first impression and is obviously of major importance. Louisiana law denies the right to trial by jury in many cases where a jury is available in most every other state. In these circumstances, it is appropriate that this Court consider the constitutionality of Article 779 of the Code of Criminal Procedure prior to federal review of the question.

Petitioner respectfully prays that this Court issue a Writ of Certiorari to review the judgment of the Twenty-Fifth Judicial District Court.

ROBERT F. COLLINS
NILS R. DOUGLAS
2211 Dryades Street
New Orleans, Louisiana

RICHARD B. SOBOL
2209 Dryades Street
New Orleans, Louisiana

Of Counsel:

ALVIN J. BRONSTEIN
603 North Farish Street
Jackson, Mississippi

Dated: February 6, 1967

Certificate of Service (omitted in printing).

*Duly sworn to by Robert F. Collins, jurat omitted in printing.*

SUPREME COURT OF LOUISIANA

No. 48,573 February 20, 1967

State of Louisiana

v.

Gary Duncan

---

In re: Gary Duncan applying for writ of certiorari

---

The application is denied. No error of law in the ruling complained of.

/s/ JBF
/s/ JBH
/s/ FWH
/s/ EHMcC
/s/ WBH
/s/ JWS

---

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
February 20, 1967

/s/ Harold A. Moise, Jr.
Deputy Clerk

STATE OF LOUISIANA
TWENTY-FIFTH JUDICIAL DISTRICT COURT
PARISH OF PLAQUEMINES

[Caption omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Pursuant to Rules 10 and 11 of the Supreme Court of the United States, notice is hereby given that Gary Duncan, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of Louisiana denying appellant's application for a writ of certiorari, entered in this action on February 20, 1967.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Appellant was convicted of the crime of simple battery, in violation of (L.S.A.-R.S. 14:35); was sentenced to sixty days confinement and a fine of $150, with twenty additional days confinement in the event fine and costs are not paid; and is presently enlarged on bond in the sum of $1,500.

II. Pursuant to Rule 12(2) of the Supreme Court of the United States, the clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. The Bill of Information, filed December 5, 1967, including the notations of the plea, the verdict and the sentence;

2. Appellant's "Demand for Trial by Jury," filed January 25, 1967;

3. Appellant's "Bill of Exception No. I," filed and signed by Hon. Eugene E. Leon on February 1, 1967;

4. Appellant's "Notice of Intention to Apply for a Writ of Certiorari," filed February 1, 1967;

5. Extract from the Minutes of Court, Wednesday, February 1, 1967, pertaining to this cause;

6. Appellant's "Petition for a Writ of Certiorari to the Twenty-Fifth Judicial District Court," filed in the Supreme Court of Louisiana on February 6, 1967;

7. The Order of the Supreme Court of Louisiana denying a writ of certiorari, filed on February 20, 1967;

8. This "Notice of Appeal to the Supreme Court of the United States," dated May 12, 1967.

III. The following question is presented by this appeal:

Do the Sixth and Fourteenth Amendments to the United States Constitution secure the right to a trial by jury in a state criminal prosecution for "simple battery," where a two year prison term may be imposed?

RICHARD B. SOBOL
2209 Dryades Street
New Orleans, Louisiana

DONALD JUNEAU
2209 Dryades Street
New Orleans, Louisiana

Attorneys for Gary Duncan,
Appellant

Dated: May 12, 1967

Certificate of Service (omitted in printing).

SUPREME COURT OF LOUISIANA

[Caption omitted]

ORDER

Upon consideration of appellant's Motion for Enlargement of Time in Which to Docket Appeal in the Supreme Court of the United States,

IT IS ORDERED that appellant's time to docket this case in the Supreme Court of the United States be, and it hereby is, enlarged to and including July 24, 1967.

/s/ Joe W. Sanders
Associate Justice

Dated: July , 1967

*COUNSEL'S NOTE*

*Uncertified Transcript of Testimony and Notes of Evidence before 25th Judicial District Court, Parish of Plaquemines, State of Louisiana was not before the Supreme Court of the State of Louisiana.*

25th JUDICIAL DISTRICT COURT
PARISH OF PLAQUEMINES
STATE OF LOUISIANA

STATE OF LOUISIANA — NO. 14643

vs. — SIMPLE BATTERY

GARY DUNCAN

TESTIMONY AND NOTES OF EVIDENCE
TAKEN BEFORE THE HONORABLE
EUGENE E. LEON, JUDGE PRESIDING
ON WEDNESDAY, JANUARY 25, 1967.

APPEARANCES:

LEANDER H. PEREZ, JR., ESQ.
DISTRICT ATTORNEY

DARRYL W. BUBRIG, SR., ESQ.
ASSISTANT DISTRICT ATTORNEY

ATTORNEYS FOR STATE
OF LOUISIANA

RICHARD B. SOBOL, ESQ.
ATTORNEY FOR DEFENDANT

REPORTED BY:

RONALD B. HOTZ,
OFFICIAL COURT REPORTER

MR. SOBOL: Your Honor, may it please the Court, I'd like at this time to pass up to you a demand for trial by Jury in this case. (Hands document to counsel)

MR. SOBOL: If I may speak on the motion, Your Honor, there is no authorization for a Jury trial in a non-felony case under Louisiana law. It's the defendant's contention that under the United States Supreme Court ruling in State versus Schackenberg, that where the potentiality of the sentence is in excess of six months, there is a right to trial by Jury. It's on this basis, not on the authorization of the State of Louisiana law to be found, that we make a request for trial by Jury.

MR. BUBRIG: Your Honor, the State will certainly oppose a trial by Jury. This is a misdemeanor. The law is very clear. The Louisiana law is very clear that the defendant does not have a right to trial by Jury unless the case is a felony, and I think that the defendant cannot be denied any [3] rights by a trial by Judge.

THE COURT: The Court is very familiar with this statute fixing the juries. Misdemeanors are not tried by Jury with or without hard labor. It's a five-man jury with hard labor or a twelve-man jury and nine men concurring; capital must be a twelve-man jury, twelve men concurring. These are the requirements under the Louisiana law. The Court is going to deny your request.

MR. SOBOL: The defendants would like to reserve a bill of exceptions from the Court's ruling on this motion, making part thereof a written demand, counsel's comments, and the ruling of the Court.

The defendant is ready for trial, Your Honor. We'd like to make a motion for a sequestration of all witnesses.

MR. BUBRIG: The State will prove with the testimony of Wayne M. Sarman (spelled phonetically) and others, that on the 18th day of October, 1966, Gary Duncan, at about 4:30 P.M., did strike Herman M. Landry, Jr., [4] with his hand, without his consent – the consent of Herman M. Landry, Jr.; that the striking was within the Parish of Plaquemines, and in particular, Boothville, Louisiana.

The State would like to call for its first witness.

THE COURT: Wait just a second. Do you have an opening statement to make, Mr. Collins?

MR. SOBOL: Mr. Sobol.

THE COURT: Mr. Sobol, I'm sorry.

MR. SOBOL: No. We'll waive the opening statement at this time. We'll open prior to the defense's case, if that will be all right.

THE COURT: The procedure is that the opening statements are made upon the onset of the trial, any statement you wish to make. If the defendant waives it, his opening statement which he has a right to do – the District Attorney has no right to waive the opening statement. If the defendant [5] waives his right, then he can cover it in his closing statement.

MR. SOBOL: We do so waive, it Your Honor.

MR. BUBRIG: The State will call for its first witness, Wayne M. Sarman.

THE COURT: Let me ask you something: You had requested a sequestration of all witnesses. Did you call the list of witnesses?

THE CLERK: Yes, sir. I called them and they're outside, except Deputy Smith.

THE COURT: Deputy Smith, will you step outside. You are a witness in this case. (All witnesses sequestered)

WAYNE MICHAEL SARABIN
P. O. BOX 175
VENICE, LOUISIANA

after having been first duly sworn by the Clerk of Court, did testify as follows:

DIRECT EXAMINATION

BY MR. BUBRIG:

[6] Q. What's your full name? A. Wayne Michael Sarabin.

Q. How old are you? A. Fourteen.

Q. What is your birth date? A. May 26th, 1952.

THE COURT: Mr. Collins, do you have any witnesses. I don't know whether you subpoenaed any.

MR. SOBOL: All witnesses are included, Your Honor.

THE COURT: I saw other people sitting in the Courtroom.

MR. SOBOL: They're not our witnesses.

THE COURT: It's Mr. Sobol. I'm sorry.

BY MR. BUBRIG:

Q. Wayne, do you recall an incident that occurred on October 21st? A. Most of it; not all of it.

Q. Could you tell us what you remember? A. Well, we was talking to the boys from what I remember of it, we were talking to the two colored boys on the side of the road. And Gary Duncan and this other boy passing in the car, [7] they stopped and backed up to us. They asked us what we was doing. We told them we was talking to the two boys, and asked them their name and all. And the two boys said we was lying. So, Gary Duncan, he asked us if we wanted to know his name, and Herman Landry told me, "Yes." And he had his name on his shirt. And he says, "Can you read?" Herman told him, "Yes." And he said, "You still want to know my name?" Herman said, "Yes." He told Herman he was a smart little punk.

Q. Those are the words he used? A. Yes, sir.

Q. Go on. A. Well, then, Herman turned to me and he told me he must have thought he was smart, and asked Herman what he said. And he slapped him.

Q. Who slapped him? A. Gary Duncan slapped Herman.

Q. Where did he hit him? A. On the arm.

Q. Was it a hard slap? A. Pretty hard, yes.

Q. Were there any other words exchanged? A. That I can recall, no.

[8] Q. Where was this? A. Well, right across the street from the speedway one store, right in front of the little fish barroom.

Q. What were you doing at the scene? A. What do you mean?

Q. Why were you there? A. Well, we was – we was all – our intention was to go over to the store. We used to go there – over there every evening and get a soft drink after school. We was walking over there and these two boys was walking. So, we went to talk to them.

Q. What time was this? A. Right after school let out.

Q. What time does school let out? A. School lets out at 2:30.

Q. What was the discussion between you and the two colored boys about? A. Well, we was talking to them. They had an incident at school. They had a little trouble, and we was asking them about it.

Q. Did Herman Landry ever strike Gary Duncan? A. No, sir.

Q. Did he ever threaten him? A. Well, after Gary Duncan slapped him, he said he [9] was going to call the police on him.

Q. But, only after he was slapped? A. Yes, sir.

Q. You mentioned the name Gary Duncan. Who is Gary Duncan? Would you recognize him? A. Yes, sir.

Q. Is he in the Courtroom? A. Yes, sir.

Q. Where is he? A. Right sitting – right over there. (Indicating)

Q. You're certain? A. Yes, sir.

MR. BUBRIG: I have no further questions.

## CROSS EXAMINATION

BY MR. SOBOL:

Q. Wayne, all the questions you just answered were in response to a question about October 21st. Do you have any particular recollection that it was the 21st of October rather than some other day? A. No.

Q. In other words, there was only one incident that you know of that you were involved in of this kind; there was not two, is that correct? You only know of one incident? [10] A. I was only involved in one.

Q. In one? A. (Nods head affirmatively)

Q. And you have no particular – nothing that holds the 21st of October distinct from the 18th, is that correct? A. No, sir.

Q. Now, Wayne, you're fourteen years old. Are you in school? A. Yes, sir.

Q. What school do you go to? A. Boothville-Venice High.

Q. Boothville-Venice High. What grade are you in? A. Ninth Grade.

Q. Who were the two boys you were talking to on the road, before Gary Duncan drove up; do you know who they are? A. I know them by their first names, yes, sir.

Q. What are their first names? A. Well, Bert and I can't recall the other one's name. I can't seem to recall his name right now.

Q. If I told you the name of the two boys were Albert Grant and Bernard St. Ann – A. Yes, Bernard.

Q. Bernard St. Ann. Does that sound right, does it? That sounds like those two boys? [11] A. I don't know their last names.

Q. Bert and Bernard? A. (Nods head affirmatively)

Q. Were these boys in the same school as you? A. Yes, sir.

Q. I'm sorry, what grade did you say you were in? A. Ninth.

Q. And were either of these boys in the ninth grade? A. No, sir.

Q. As far as you know – but, they're in the school the same school you go to? A. Yes, sir.

Q. And they had just entered that school the preceding month, is that correct? A. Well, I don't know when they entered. I had just started this year.

Q. You took some note of the fact that they were there, didn't you? A. Yes, sir.

Q. You did. Had you spoken to either of these two boys prior to the time you spoke to them on the road? A. No, not that I can remember.

Q. You had never spoken to them at all anywhere in the school? A. I don't know. I might have, but I don't remember.

[12] Q. How about in the boys's bathroom, in the school, had you ever seen them there? A. I seen them in there, yes.

Q. Did you speak to them in there? A. No.

Q. Were you in a group that spoke to them there? A. No, sir.

Q. You mean you had seen them when you and one of them were in the boys' bathroom, that's all. You were not in the group that – A. Yes, sir.

MR. BUBRIG: Your Honor, I object.

MR. SOBOL: To what?

MR. BUBRIG: The line of questoning. First I think it's irrelevant to the battery committed by Gary Duncan.

MR. SOBOL: I want to show the background. Actually I want to show the Court what happened to –

MR. BUBRIG: Well, Your Honor, it's not relevant as far as this particular crime is concerned.

[13] THE COURT: This man – this young man, I should say, a young man is under cross examination, Mr. Bubrig. Proceed.

BY MR. SOBOL:

Q. The answer to the question is you had not been in a group which threatened these two boys in the boys' bathroom at Boothville-Venice High School that same day or October 18th, is that your testimony? A. No, sir.

Q. You were not in that group? A. No, sir.

Q. At the time you saw them in the boys' bathroom, was a different day or the same day? A. Well, I don't remember, really recall if I seen them.

Q. Had you been aware that these boys had been threatened, physically threatened at the school the same day? A. I heard about it after it happened.

Q. You heard about it? A. (Nods head affirmatively)

Q. Now, this incident we're talking about today, happened after school, is that correct? A. Yes, sir.

Q. And you had left school, and these boys had left [14] school, and you were at a store on Highway 23, is that correct? A. Yes, sir.

Q. And were you on the west side or the east side of the road prior to the time that you saw these two boys? A. Well, we first saw them – we left the school together. They was on the east side of the road and we was on the west side.

Q. West side. And this incident where Gary Duncan allegedly hit Herman Landry, that was on the east side as well? A. Yes, sir.

Q. So, you and the group you were with crossed the road and came over to the east side? A. Yes, sir.

Q. Now, what was your purpose in crossing the road to go to the east side? A. Talk to the boys.

Q. What was your purpose in talking to the boys? A. Find out their names and one wanted to find out about something that had happened in school that day.

Q. What did you want to find out about? A. Well, they had a fight. A boy had a fight with one of them or a friend of their's, and we [15] wanted to find out about it.

Q. Now, would you categorize the conversation you attempted to have with these boys as a friendly conversation or not? A. Yes, sir.

Q. It was a friendly conversation? A. Yes, sir.

Q. It was just conversation between boys going to high school together, no threats and no making fun of them, just a kind of a conversation that you three boys, you three white boys would have with each other, is that correct? A. Yes, sir, after we crossed the road.

Q. After you crossed the road. Now, why did you say, "When you crossed the road —" Who did the talking when you crossed the road? A. Well, all of us was talking to them.

Q. And all of you at first were saying, "What's your name," is that correct? A. Yes, sir.

Q. But, you in fact knew their names, didn't you? A. Well, I never at the time, no.

Q. You didn't at the time — what did they say when you asked them their names? A. Well, I — they told us their names.

[16] Q. He told you their names or they said, "I will not tell you my name?" A. They told us their name.

Q. I see. And what happened next? A. Well, about that time Gary Duncan drove up.

Q. You mean that's all it was to it; you came across the road – how many was in this group with you that crossed the road? A. Four.

Q. A total of four boys and you crossed the road, and these fellows stopped and Bernard stopped, and you said, what's their name, and they told you their name, their full name – or did they just tell you their first name? A. Well, no. We had said a little more than that. We was talking about what happened in school that day.

Q. About this fight that happened? A. Yes, sir.

Q. And just at that point the defendant drove up, is that right; A. Yes, sir.

Q. Now, what – where was his car going; was he heading south? A. He was heading down.

[17] Q. He was heading south? A. Yes, sir.

Q. He saw the group and he stopped? A. Yes, sir.

Q. What did he do then? A. He asked what we was doing.

Q. He got out first? A. Yes.

Q. Was there someone else riding in the car with him? A. Yes, sir.

Q. Did he get out? A. No, sir.

Q. He stayed in the car. Now, what did you say to Duncan; what were you doing; who answered him when he asked that question? A. Herman.

Q. Herman answered him. Did anybody speak to him other than Herman? A. Sir?

Q. Did anybody speak to Duncan other than Herman Landry, of the group of four boys? A. No, sir.

Q. The conversation was one between Duncan and Landry? A. Yes, sir.

Q. And as I recall your testimony, when Duncan got out, he asked what was happening, and Landry's [18] answer was just – "We were just trying to find out their names," is that correct, is that what you said? A. Yes,

Q. But, you had found out their names by that point, hadn't you? A. Yes, sir.

Q. Well, why did he say he was trying to find out their names after he had found out their names; do you have any idea? A. Well, we found the names. We were getting ready to go.

Q. You were getting ready to go at that point, before Duncan showed up; A. Yes, sir.

Q. And then this conversation ensued between Duncan and Landry, when Duncan said, "You want to find out my name," and his name was on his shirt, is that correct? A. Yes, sir.

Q. And Landry said he – Duncan said, "Can you read?" Am I repeating your testimony correctly? A. Yes, sir.

Q. And what did Duncan say, "You're a smart punk?" A. Yes, sir.

Q. And at that point he hit him? [19] A. Well, Herman turned to me, and he said, "He must think he's smart, huh?" And he asked Herman what he said. And he slapped him.

Q. Oh, Herman turned to you. Now, who called who a punk? A. Gary Duncan called Herman a punk.

Q. In other words, Herman turned to you and said – he said he must think he's smart? A. Yes.

Q. I see. I didn't understand that. Then, Duncan hit Landry. Now, I wonder if, with the Court's permission you would show me the way in which he hit Landry, if you'd get up and show me. Now, I'll be Herman Landry, and you be the defendant. And you show me how that happened? A. Well, I don't remember. I don't really remember if it was the back of his hand or the front of his hand. But, he came across and hit him on the arm, like he come across – I don't remember. (Indicating)

Q. Just once, about here? (Indicating) A. Yes, sir.

Q. And at that point what happened? A. Well, Bud Lathorne (spelled phonetically) he was standing across the street at the site of the [20] private school down there. And he hollered and said if they didn't leave us alone or something, that he would call the cops.

Q. If who didn't leave you alone? A. I guess he was hollering at Gary Duncan, I guess.

I didn't understand him at first.

Q. I see. And what happened then? A. Well, Herman told Gary Duncan if he slapped him one more time he was going to call the cops on him.

Q. I see. Herman said that and then what happened? A. Gary Duncan told the two boys to get in the car and then they left.

Q. I see. So, the hitting that you're talking about, was that one supposed slap on the elbow from Duncan to Landry, and that's all there was to it, as far as you saw, is that correct? A. Yes, yes, sir.

Q. Did you speak to Officer F. J. Smith, about this accident – incident that day? A. Yes, sir.

Q. And what did you tell him about it? A. Oh, I told him that Gary Duncan hit the boy there.

Q. You told him that he did hit the boy? A. I told him he did hit the boy.

Q. You are quite sure of that? [21] A. Yes, sir.

MR. SOBOL: I have no further questions.

REDIRECT EXAMINATION

BY MR. BUBRIG:

Q. Wayne, do you know why the defendant, Gary Duncan, stopped? A. Well, I guess he wanted to know what we was doing by the boys.

Q. Did he say why he stopped? A. No. He just come over there and asked us what we was doing.

Q. Do you know of any reason for him to stop? A. I guess he thought maybe we was trying to jump the boys or something.

MR. BUBRIG: I have no further questions.

RECROSS EXAMINATION

BY MR. SOBOL:

Q. What was it about your conduct, the conduct of the group you were in that would give Duncan the impression that you were trying to jump the boys? A. Well, there was

only two of them and four of us, and we was talking.

Q. And had you blocked their way on the road? [22] A. No, sir. Well, our group was standing there, and they was – they could have left any time.

Q. Could you categorize – would you say Bert and Bernard wanted to be standing there talking to you or were supposed to stand there talking to you? A. Well, they could have left if they wanted to.

Q. But, you were not standing in the way? They were headed south and didn't you cross the road and get in their way, and in the direction they were heading? A. We crossed the road, but we never got in their way.

Q. Didn't you come to the south side of them? A. Yes, sir.

Q. But, you say they could have walked around you if they wanted to? A. All they got to do is – was keep walking straight.

Q. They could have walked straight right into you? A. No. They wouldn't have to have run into us. They could have kept going if they wanted.

Q. I see. Where was this group of four standing; this group of four that you were in? A. What's that?

Q. Weren't they standing in front of Bert and Bernard on the south side? [23] A. No. We was standing – well, they were standing like this. They were standing right – they could have kept on going. We didn't stop them.

Q. So, the only thing that might have given Duncan the impression you were about to jump these boys was the numbers? A. Yes, sir.

Q. Four of you and two of them. Were Bert and Bernard friends of yours before this? Had you seen them at school – I mean this was not – A. Well, no. This is the first time I had talked to them.

Q. The first time you talked to them. A. Yes.

MR. SOBOL: That's all the questions I have.

MR. BUBRIG: I have no further questions.

THE COURT: Step down, son.

RANDOLPH SCARMAN
P. O. BOX 147
VENICE, LOUISIANA

after being first duly sworn by the Clerk of Court, did testify as follows:

MR. SOBOL: Your Honor, I wonder if the witnesses understand that they're not supposed to be talking to each other about the case? I'm referring to the witnesses in the Court.

MR. BUBRIG: We'll keep them separated.

THE COURT: Tell the boy that just testified to go sit in the Jury Room.

DIRECT EXAMINATION

BY MR. BUBRIG:

Q. Is it Randolph or Randy? A. Randolph.

Q. Randolph, how old are you, son? A. Fourteen.

Q. Do you recall an incident that occurred in Boothville? A. Yes, sir.

Q. Do you recall about which date that was? A. No, sir.

Q. Was it in the morning or afternoon? A. Afternoon.

[25] Q. Could you tell the Court what happened? A. Yes, sir.

Q. Go ahead. A. Well, it started upstairs. Well, I wasn't with the boys upstairs. And – well, every evening me and my cousin, we hitchhiked home. And we was walking down to the store with Herman. So, as we was walking and we was talking to Bert and Bernard, as we was walking, and Herman Smith spit over his shoulder like that. And so, we walked a little further down, and then Bert spit. And he spit on his shirt. And we start leaving. Well, I mean me and Herman – and so – we walked down a little further. And Herman or Wayne said something to him or something. And they was saying some words back to me. I don't remember. An when we got down to the store and was Bert, yes, I believe it was Bert, asked us if we wanted to fight them. And Herman said, says, "We'll fight if you want –

if you all want to fight." He says, "If you all want to fight, I'll go get some boys to fight." And Wayne told him his age, and he didn't believe Wayne. Wayne had is birth certificate with him. So, we went across the street and we was – well, [26] well, Herman – and then, Herman was talking about – about that fight they had upstairs that Tuddie and Bernard had. And Wayne was showing him his birth certificate out, and then Gary, Gary come down the road in his car. An he got a little ways by, and he backed up. He come out. Well, he backed up. And he got out the car. There was another guy sitting in the car with him. And so, he got out, and he asked Bert what was wrong. And Bert said, "These boys want to fight." And Herman said, "no, we're just over here asking them their name." And so, Gary asked Herman, he said, "Herman, you want to know my name?" Herman said, "Yes," he said, asked Herman, "can you read?" Herman said, "Yes." "You still –" He said, "You still want to know my name?" Herman says, "Yes." He said, "You smart, huh?" Herman said, says, "No." He told – he said, "Best for us not to get smart or he was going to whip all of us. So, he turned around. He told Bert and Bernard to get in his car. And he turned around. Herman told me that – Herman said, "He must think he's tough." And Gary happened to hear him. He said – Gary turned around and said, "What [27] did you say?" And Herman said, "You must think you're tough." And that's when he – well, he hit Herman on the arm. And right then Mr. Lathum hollered. Then Gary told him to get in his car. So, he got in his car and he took off down the road. So, we was walking over to the store, and Mr. Lathum told us to stay there. He said, "I'm going to call F. J." So, we called F. J. So, after a while F. J. come up there with Gary and asked some questions, and asked us our name and age and all. And then he took us up the road by Herman's mama, and then he pressed charges.

Q. You referred to one Bernard. Who is Bernard? A. He's one of the witnesses for Gary, I believe. I'm not sure.

Q. He had been in some difficulty earlier in the day, is that correct? A. Yes, sir.

Q. He had been involved in a fight? A. Yes.

Q. Where at? A. In Boothville School, upstairs.

Q. Were you a party to that fight? A. No, sir.

[28] Q. Was either Wayne or Herman a party to that fight? A. No, sir.

Q. You stated that the defendant struck Herman. How did he strike him? A. Well, he hit him with a back arm like that, hit him right here on the shoulder. (Indicating)

Q. What type of a hit would you say it was? A. Well, it was – well, he had his first bundled, but it was like a slap or a hit towards the arm or shoulder.

Q. Had he threatened you all? A. Yes, sir.

Q. What did he say when he threatened you? A. He said – well, he said, "You all getting smart." He said, "I'm going –" Well, he said, "I'm going to beat all of you all." Like that.

MR. BUBRIG: I have no further questions.

CROSS EXAMINATION

BY MR. SOBOL:

Q. Were you a witness to this fight in the school? A. No, sir.

Q. You just had heard about it? A. Yes, sir. Well, Herman and Wayne had told me about it.

[29] Q. Herman and Wayne had seen it? A. Yes, sir. They were upstairs.

Q. Wayne had seen it? A. Yes, sir.

Q. Wayne is your man that just testified? A. Yes, sir.

Q. He told you he had seen this fight. I see. Now, when you were walking down after school was out, you left the school and you went to Highway 23, is that correct? A. Yes, sir.

Q. And you saw Bert and Bernard? A. Yes, sir.

Q. Well, tell me about this spitting again. I didn't get that straight. How did that go? A. Well, we was walking, and then we was talking to ourselves, me and Wayne and Herman. And there was another boy, Westley. But, he moved. And we was talking to ourselves. And Herman

spit like that, and looked across the road. And Bert did the same thing, but spit on his shirt, on his shoulder.

Q. Bert spit on Herman's shirt? A. No, Bert spit on his own shirt.

Q. Spit on his. I see. A. And he hollered something, and we started laughing.

[30] Q. I see. Because he had spit on his shirt? A. Yes.

Q. But, these two groups were at least trying to spit at one another? A. No, sir, not at one another.

Q. Or just in the direction? A. No, sir. We was – well, the road runs like this. They was on this side and we was on this side, and Herman spit this way. And he spit towards the road. But, he spit on his shirt. (Indicating)

Q. At this point you're on different sides of the road while the spitting is going on? A. Yes, sir.

Q. Then what happened then? A. Well, we was walking a little further down the road.

Q. You're each on different sides, now, kind of parallel to each other, is that right? A. Yes, sir.

Q. I see. A. And then they was – said some words or something like that until we got to back and forth and looking at each other.

Q. What kind of words were these? Were these friendly words or were you making - [31] A. I couldn't remember the words, but I know they was – were saying something.

Q. What kind of things, do you remember? What were you talking about back and forth? A. Something about upstairs.

Q. About this fight? A. Yes, upstairs.

Q. What kind of things about the fight were you saying, do you know? A. I don't know.

Q. You don't remember anything about it? A. No.

Q. And then what happened? A. Then, when we got to – in front of the store, when we got in front of the

store and then – well, that's when Bert asked us if we wanted to fight.

Q. He called across the road to you, is that right? A. (Nods head affirmatively)

Q. When he said, "Do you want to fight?" Did Wayne hear that, do you suppose? A. Well, he was there. I don't know if he heard it. But, he was there.

Q. Bert shouted it out across the road so you could hear it very plainly? A. Yes, sir.

[32] Q. And did his making the remarks surpise you in light of what had just transpired between these two groups; was it the kind of a remark you might expect? A. Well, no, not to me.

Q. What are the words, "not to me," referring to, that you did not expect it? A. Well, we didn't want to fight them. But, if they would have wanted to fight we would have fought them like that.

Q. I see. You were willing to fight, but you didn't talk about a fight in advance of your shouting this. You didn't mention fight first other than the fight upstairs. It was Bert who said, "You want to fight?" A. Yes.

Q. And Bert is with one person and you're with three, and he challenges this group to a fight? A. That's right.

Q. (This question stricken from the record upon the orders of the Court.)

MR. BUBRIG: If Your Honor please, the State asks that that last remark – it's a self-serving declaration by the attorney, that it be stricken from the record.

[33] MR. SOBOL: I have no objection.

THE COURT: Let that last remark be stricken from the record.

There is no Jury, however, a record is being made.

BY MR. SOBOL:

Q. So, they challenged you. He said, "Do you want to fight?" And in response or somehow in response, you crossed the road. It was just then you crossed the road, you and your friends? A. Well, it wasn't exactly then.

Q. Well, what happened between these challenges to fight and the time you crossed the road? A. Well, that's when Herman told him if they wanted to fight, they'd fight. And he said, "If you all want to fight, I'll go home and get somebody, get somebody to help him," or something like that.

Q. Bert was going to get more men to equal the odds? A. Right.

Q. And then what happened?

MR. BUBRIG: [34] If Your Honor please, the State asks that counsel for the defendant control his remarks to the testimony of the witness, and not insert any information, Your Honor, into the record. This is a self-serving declaration.

MR. SOBOL: Your Honor, I was trying to get clear what he was –

MR. BUBRIG: No, you're trying to get into the record before the Court your own personal remarks.

MR. SOBOL: I am not.

THE COURT: You have done this on two or three occasions. The Court has caught testimony that you asked this question, and then he answered it, and you come back with another question stating what he answers. And you don't even state what he has answered. You're changing the declarations of this man completely. Whether you're trying to put something into the record, I have no idea. But, I wish you would confine your [35] questions of this gentleman to his answers, and not add your own words to his answer.

MR. SOBOL: Well, I was trying to get straight what the witness meant by, "Get some more people." But, if there's an exception to that remark –

MR. PEREZ: And further, if Your Honor please, the State has not objected to the lengthy questioning of certain witnesses, but the State will object at this time to any testimony with respect to the defendant – anything that these boys might have said, and the State will prove that the de-

fendant came upon this scene when there were five or six people, and that was when the crime was committed by the defendant, not by these boys. And anything that these boys might have said or done has nothing to do with the particular charge at all, and that is simple battery.

THE COURT: Let this objection be noted for the purpose of [36] the record.

The Court did not sustain Mr. Bubrig when he made this objection. As far as the Court is concerned, this crime being tried before me today, this is highly immaterial – I mean he stated he wants to show the events leading up to it. But, the events leading up to it have no bearing on the crime as far as I have seen.

MR. SOBOL: We haven't put our case on, yet, and I hope that the point – to show why they do have a connection with the actual crime.

THE COURT: For the purposes of the record, we'll let the objection Mr. Perez raised go into the record.

MR. SOBOL: That's an objection and not a motion, I understand.

BY MR. SOBOL:

Q. They said if they're going to fight, we want to get some more people, is that right? Is that the correct statement? Is that what you said? A. I did not understand what you said.

[37] Q. All right. Let's go back and make sure this is your testimony.

It's your testimony, is it not, that Landry said, "We don't want to fight, but if you want to fight we'll fight, is that correct?" A. That's right.

Q. All right. Now, who said, "What next?" A. Then – well, Bert thought that we was about, oh, I guess, sixteen or seventeen years of age. Well, before that he said that he would go ahead and get some help, because we was that age, you know. They – he thought we was older than him. And Wayne says, "I can prove that." And Wayne pulled out his birth certificate. And that's one reason why we started across the road, to show that Wayne was fourteen, and that was about it.

Q. He came across the road with his birth certificate? A. Yes, him and Herman started first. And me and the other boy was sort of behind him.

Q. I see. What happened when he got there? A. Well, we got across the street, and Wayne was showing them his birth certificate. And then Herman and them started talking about the fight upstairs. And then that's when Mr. Duncan come out.

[38] Q. What kind of conversation were they having about the fight upstairs? A. About Bernard had got knocked down.

MR. PEREZ: If Your Honor please, the State will –

THE COURT: I see no relevancy of this line of questioning, Mr. Sobol.

MR. SOBOL: Well, Your Honor –

MR. PEREZ: If Your Honor please, at this time I would like to make this remark. I think that this line of questioning is more damaging to the defendants, because the State has seen by evidence elicited by counsel for the defense that these two colored boys who are witnesses of the defendant had been proven to be the ones who were the aggressors, and I can't understand any further questioning along these lines which to me seemed to tend to prove the guilt of the defendant.

THE COURT: Well, these two boys are outside. They are not charged. Both Bernard and Bert are here and are going to be witnesses.

[39] MR. SOBOL: Do I understand that this is a motion?

THE COURT: Now, you're going into the fight on the school grounds. This may be –

MR. SOBOL: Your Honor, I'm trying to show –

THE COURT: – a serious thing. The Court realizes that you're trying to show, Mr. Sobol.

MR. SOBOL: Well, –

THE COURT: Does this have any bearing on your case?

MR. SOBOL: Your Honor, that's what I was trying to explain. I want to show the Court that these boys were

being threatened at the time Gary stopped; that there was a reason for him to believe they were being threatened; that this was his purpose for stopping. And I think that that has a good deal to do with the events that followed.

I also am attempting to prove that he did not hit Herman Landry, but I think that if I [40] could not give an explanation of why this fellow who was just driving by stopped the car, there would be some question raised about what he was doing there, what Duncan was doing at this scene with these high school boys, young boys. And I'm attempting to indicate to the Court, which I hope to do in addition to this cross examination by oral testimony, that this group was threatening or that there was good reason to think from the Duncan point of view, who was threatening these boys; who was in a fight that day who had to go to school for the first time, and had gotten into a fight, which I think the evidence will indicate, can hardly be called a fight in which they were the aggressor. And this was a continuance of this same thing; that these boys were being harassed on the highway, and that those were the events that lead up to the events that followed.

Now, I think that it's perfectly clear within the scope of cross examination. But, I just wanted to make clear what I was [41] getting at. Moreover, this exact incident, this exact spitting and talking was on direct examination, was testified to by the witness in response to Mr. Bubrig. And I'm thoroughly within the scope of cross examination.

THE COURT: There's nothing in there about this fight at school. That's what I'm getting at. Now, I have allowed this question to go under cross examination.

However, the facts of what went on on the side of this road in front of this restaurant, not what went on at school is what the Court is interested in; what went on on the side of that road.

MR. BUBRIG: Your Honor, I think everything that happened prior to Gary Duncan coming upon the scene would prove nothing since he would not have any knowledge of what went on prior to his arriving at the scene, that all this questioning of what happened while they were walk-

ing down the highway – Mr. Duncan didn't arrive at the scene until they reached [42] in front of the store, which would not lead him to believe anything until he got to the store – at least to the store, and all these other questions are irrelevant.

MR. PEREZ: That's the reason for my statement to the effect that this testimony is very harmful to the defendant, because the defendant happens upon the scene where he sees two colored boys and three or four white boys, and he gets out and he hits one of the white boys for no cause at all. Evidently he knows nothing about it.

Now, Counsel for the defense intends to introduce evidence that the defendant knew about it, then I would say he's getting his client in further trouble, because evidently, if that be the case, his client was going out and looking for these boys. I don't know if Counsel for the defendant will attempt to show that he called a deputy in anticipation of this fight, I don't know. But, that's the purpose of my statement in saying [43] that it's damaging to the defendant to exhibit this type of testimony.

MR. SOBOL: I don't know where we are, exactly. Is there a motion?

THE COURT: Well, there was an objection to your line of questioning – I would say a statement by Mr. Perez. You're damaging your client in your line of questioning. You're damaging him by asking these questions.

MR. SOBOL: I never heard of that as a basis for an objection before, Your Honor.

THE COURT: I can't see the relevancy of these questions; I truthfully can't, the fact that there was a fight at school and everything else – I don't see anything – what has that to do with the crime before me today?

MR. SOBOL: All this came in on direct, Your Honor. The first sentence out of this witness' mouth was it started with the fight upstairs, on direct examination. I think [44] this is the entire incident on the direct examination, which started long prior to the time Gary Duncan drove up.

The State has to prove its case beginning with the arrival of Duncan, so I will submit the question.

MR. PEREZ: Well, the State will withdraw its objection, Your Honor, but we'll re-emphasize the fact that a lot of this is immaterial, and that this matter could carry on for hours with other witnesses if we go through this same manner.

All I'm doing – the basis of my objection was to have the questions applied to the matter at hand, the crime which the defendant is charged with.

THE COURT: Well, if you withdraw your objection, I would say this: The Court finds it highly irregular and I'll state for the record to Mr. Sobol, I think you are in some ways, in the line of questioning, injuring your client in this line of questioning; however, if you wish to proceed, the Court is not going to stop [45] you, sir. This is not before a Jury.

MR. SOBOL: Thank you, sir.

THE COURT: The Court weighs all of this, and if I'm hearing all of this, I'm not going to say any more. You may proceed. The Court is not going to stop you right at the present time; however, try to limit yourself to the crime herein.

MR. SOBOL: Thank you, sir.

BY MR. SOBOL:

Q. What was this talk about this fight that you were having when you crossed the road? A. Oh, about how Bernard – well, this boy Tuddie hit him or something like that, and knocked him down. I don't know exactly how it went, because I wasn't up there. And while I wasn't too much listening to them – but, I was standing right close by them.

Q. You're talking about on the highway, now, aren't you? You're not talking about the – A. Well, I was talking about the fight at school. Ain't that what you're asking me about?

Q. No. When you crossed the road – I'm talking about [46] on Highway 23, opposite the grocery store, right before all this happened.

THE COURT: My recollection is that you asked him, when all the objections came about, you were asking him about the school fight. You asked him when he crossed the road, what was the talk about the fight. I think he gave you a responsive answer to your question.

BY MR. SOBOL:

Q. You were talking about what was said after you crossed the road. That's what I'm asking you? A. Yes.

Q. I see, good. And what happened then? A. Then – well, they was talking.

Q. Then Mr. Duncan went by and – A. And they went a little past, down on us. And then he backed up and come there by us where we was standing.

Q. And said what? A. Well, he got out the car and asked Bert what was wrong: And he said these boys want to fight. Herman said no, and he just asked them their name. And Mr. Duncan says, "You want to know my name?" And Herman says, "Yes." [47] And so, he asked Herman, "Can you read?" Herman said, "Yes." He said, "You still want to know my name?" Herman said, "Yes." "You all smart or something like that," and threatened to beat us all. And then he told Bert and Bernard to get in his car. And when he turned around to go towards – I guess to his car, Herman told me that – Herman said, "He must think he's tough." And he must have heard Herman when he turned around. Herman told – he asked Herman what he said. And that's when he struck Herman, after Herman told him what happened, what he said.

Q. And after he had told the boys to get in the car? A. Yes, sir.

Q. Let me see if I understand you. Was it your impression that Duncan and these boys were about to leave when he overheard Landry say, "He thinks he's tough," and then turned around; is that what happened? A. He told the boys to get in the car. When he turned his back, Herman told me that.

Q. Oh, Duncan also turned his back towards the car? A. I don't know if he was going to his car. But, he turned his back.

[48] Q. He turned his back and his face was towards his car, was it? A. Well, he had just started to turn around or turning around. The car was parked like that. He turned around. So, he had to be facing towards the river. (Indicating)

Q. I see. And he turned back around when he heard this remark? A. And walked over to Herman.

Q. And he hit him? A. Well, he asked Herman what he said. He said – Herman said, "You must think you're tough." And that's when he hit Herman.

Q. Did Herman scream or anything when he was hit? A. No, sir.

Q. What happened then? What did he say? A. Well, then – well, right after, when he hit him, said – Herman says something about going to call the cops or something like that, or something like that. And then right after he said that, Mr. Lathum hollered at Gary and told him to get out, get away or something, get out of here, or something like that. And he got in his car and he left. And then we walked over to the store. And then Mr. Lathum told us to stay there.

[49] Q. All right. By this time what you're talking about now, Duncan had left? A. Right.

Q. Was Herman hurt? A. No, sir.

Q. He was not hurt? A. No, sir.

MR. SOBOL: No further questions.

REDIRECT EXAMINATION

BY MR. BUBRIG:

Q. Randolph, you mentioned the name of Mr. Duncan several times. Who are you referring to? A. It's –

Q. Is that the defendant? A. Yes, sir.

MR. BUBRIG: No further questions.

THE COURT: You may step down.

MR. BUBRIG: I'd like to call Herman Landry, Jr.

HERMAN LANDRY, JR.
BOX 324
BURAS, LOUISIANA

after being first duly sworn by the Clerk of Court, did testify as follows:

DIRECT EXAMINATION

BY MR. BUBRIG:

Q. Your name is Herman M. Landry, Jr.? A. Yes, sir.

Q. How old are you, sir? A. Fourteen.

Q. Fourteen? A. (Nods head affirmatively)

Q. What is your birth date? A. August 27th.

Q. What was that again, please? A. August 27th.

Q. What year were you born? A. 1952.

Q. 1952? A. Yes.

Q. Do you recall an incident that happened on October 18th of 1966? A. (Nods head affirmatively)

THE COURT: Son, you're going to have to talk up so I can hear you, and the attorneys can hear you.

[51] THE WITNESS: Yes, sir.

BY MR. BUBRIG:

Q. Beginning – or would you explain to the Court what happened on the 18th? A. Well, me and Gregory Wayne and this other boy, we was coming out of school. We was going to the store. And we got out on the road, these two other boys was on the other side of the road. And I spit on the side of the road. And the other boy spit. And he spit on his sweater. And we laughed at him. And then we walked down the road, and we got in front of that little store, and Roggie told me to ask him his name. So, I asked him his name. And he said something. And we couldn't hear him, because some trucks was passing. So, then, he said something, oh, I don't know what he said. And Wayne went across the road to show him his birth certificate. So, we went to cross over. And they told us their names. We knew one of them had got in a fight in school. And we asked them what had happened. And he was telling us. Then, that boy right over there stopped in his car. And he backed up. [52] And he got out his car and he asked us what was going on, and we told him nothing. (Indicating) And then I told him nothing. Then he said what you all doing. I said, 'We're just asking these boys their name."

He said, "You want to know mine?" I said, "Yes." He said, "Can you read?" I said, "Yes." He said, "You still want to know?" "Yes." He said, "You're a smart little –" and then he said a curse word. And then I said, "No." Then, he told us he was going to beat us all up. And then I told that other boy, I said, "He thinks –" I said, "He thinks he's tough." That's when he slapped me. And then this other guy told him to – Bud Lathum was over at the private school, told him to go ahead. And then he called the Sheriff, and F. J. came. And that's the – and he asked us our name and –

Q. You say he threatened you? A. They – he told us he was going to beat us up if we got smart.

Q. Then he struck you? A. Yes, sir.

Q. How did he strike you? A. He slapped me on the arm.

Q. What did he hit you with? [53] A. His hand.

Q. Where at on the arm? A. Right here. (Indicating)

MR. SOBOL: What was the last question?

THE COURT: Read the last question.

(Question and answer read by the reporter.)

BY MR. BUBRIG:

Q. You stated that "he hit me," and you pointed – A. That boy right there. (Indicating)

Q. That's the defendant? A. Yes, sir.

Q. Do you know his name? A. Gary Duncan, I believe.

Q. Did you consent to him hitting you? A. I don't know what you mean.

Q. Did you agree that it was O.K. for him to hit you? A. No, no, sir.

MR. BUBRIG: I have no further questions.

CROSS EXAMINATION

BY MR. SOBOL:

Q. I didn't see where you pointed in response to the question where he hit you? A. [54] He hit me right here. (Indicating)

Q. A little above your elbow? A. Right above my elbow.

Q. He hit you hard? A. It stung a little bit.

Q. What's that? A. It stung a little bit.

Q. Stung a little bit? A. (Nods head affirmatively)

Q. Once, is that right? A. Yes, sir.

Q. Did you know Bert's name before this incident? A. No, I didn't.

Q. And did you know Bernard's name? A. Yes, I knew Bernard, because he played football.

Q. At the school? A. Yes, sir.

Q. Which of the two were in the fight? A. Sir?

Q. Which of these two boys were in the fight? A. I didn't know that. That's why I went across the road, to ask them.

Q. You didn't witness the fight? A. No, sir.

MR. BUBRIG: Your Honor, I'm going to object to this. This [55] was not opened on direct examination, anything about the fight, when this particular witness took the stand. He merely started when he was walking from the school. We're getting back to irrelevant questions.

THE COURT: He's already answered the question, he never saw the fight. I think the other two witnesses testified that he never saw the fight. I'm talking about the fight at school. He didn't know Bert, and he knew Bernard from playing football. He didn't know which one of them had been in a fight at school.

MR. SOBOL: I think the record would show, if we took the time to read it back, that the fight was mentioned on direct examination; not that it is important.

MR. BUBRIG: I withdraw the objection,then.

THE COURT: The witness is on cross examination as far as I'm concerned. It's highly irrelevant, [56] but proceed.

BY MR. SOBOL:

Q. You didn't witness this fight in this school, is that correct? A. No, sir.

Q. And your purpose in crossing was to ask them about the fight? A. Yes, sir.

Q. You wanted to know what happened, is that the idea? A. Yes, sir.

Q. And Wayne crossed the road first, is that your testimony? A. I don't remember.

Q. Which is the boy that had the birth certificate in his hand? A. Wayne.

Q. When you all crossed, where did you stand; when you crossed the road, where did you stand? A. On the other side of the road.

Q. In relation to Bernard? A. Sir?

Q. In relation to Ber. and Bernard, were you in front of them? A. Yes. I stood in front of them. I didn't stand in back of them.

[57] MR. PEREZ: Where?

THE WITNESS: In front of them.

BY MR. SOBOL:

Q. Where were the other three boys standing? A. Standing on the side of me, I guess.

Q. Did you ask them their names? A. Yes, sir, we asked Bert his name.

Q. And did he tell you? A. Yes, sir.

Q. He told you just Bert? A. Yes, sir.

Q. And then you began to talk about this fight, and that's when Duncan arrived? A. Yes, sir.

Q. And in response to Duncan's questions to what was going on, you said what? A. I said we was just talking; told him nothing at first, and then he asked us what we was doing. I just told him we asked these boys their name, and we was talking about a fight that one of hem had in school.

Q. You told him you were talking about the fight in school, is that right? A. No. I told him – I said we wasn't doing nothing, [58] at first.

Q. Yes. A. And then he asked us what we was doing there. And I told him we was just talking about a fight in school. And we was asking them boys their names.

Q. I see. Was that what you told him; now was it at that point that he said you want to know my name, too? A. Yes, sir.

Q. And you didn't know his name at that time, did you? A. No, sir.

Q. Now, after, you say he cursed at you, is that right? A. Yes, sir.

Q. And then what happened; what's the next thing he did? A. What you mean, after he asked me if I wanted to know your name, if I wanted to know his name?

Q. Yes. Then he cursed you, isn't that right? As I recall your testimony, after you said, "Yes, I do want to know your name –" A. He said, "You want to know my name?" He said, "Yes." He said, "Can you read?" He said, "Yes." He said, "You still want to know my[59] name?" And then he cursed.

Q. What I want to know is this; what happened next? A. Then he told us he was going to beat us all up if we got smart.

Q. And then what? A. Then I told Wayne that I guess, I said, "I guess he thinks he's tough." And that's when he hit me.

Q. Had he at that point told the boys to get in the car yet? A. Sir?

Q. And Duncan at this point, at that point that he hit you, had he told the boys to get in the car? A. I don't remember.

Q. You don't remember? A. (Shakes head negatively).

Q. What school do you go to? A. Boothville-Venice.

MR. SOBOL: I have no further questions.

MR. BUBRIG: I have no further questions.

THE COURT: You may step down, son. Go in the Jury Room and don't talk about this with Wayne and[60] other boy.

MR. BUBRIG: I'd like to call Mr. Lathum, at this time.

P. E. LATHUM
ROUTE 1
BURAS, LOUISIANA

after having been first duly sworn by the Clerk of Court, did testify as follows:

DIRECT EXAMINATION

BY MR. BUBRIG:

Q. How old are you, Mr. Lathum? A. Forty-two.

Q. Who are you employed by? A. I have my own business, Bud's Boat Rental Company.

Q. You're an independent business man, is that correct? A. I didn't understand your question?

Q. You're an independent business man? A. That is correct.

Q. Did you have occasion to witness an incident on October 18th, 1966? A. Yes. Would you repeat that? I didn't understand.

Q. On October 18th, 1966, did you witness an incident in Boothville, Louisiana? A. That is correct.

Q. Could you tell the Court what you witnessed? [61] A. I was in front of the — in the vicinity of the Safeway Stores in Boothville, when I noticed some teenagers standing in front of the Little Fish, on one side of the road. There were some white teenagers and on the other side of the road were some colored teenagers. And they seemed to be talking back and forth across the road. I could not hear their conversation. And after watching them for a few minutes, I noticed the white teenagers cross the street to the side where the colored teenagers were. And they were in conversation, which I could not understand. And about that time a car drove by going towards Venice. And he stopped in the middle of the road, and backed up and came across in front of the Little Fish Restaurant or Bar. And he pulled up beside the teenagers and a man got out of the car and went around the back part of the automobile and approached the teenagers, and said something to the two colored teenagers, which at that time they got in his automobile. And after a few seconds he was talking to the white teenagers. One of the teenagers was standing there with his [62] arm folded. The man made a pass at the white teenager, hitting him on the arm, knocking his arm up around his shoulders. And then he got in the automobile and went on down the road towards Venice. At that time I called the Deputy. And the teenagers walked over to the Safeway Store and sat down and waited until the Deputy arrived.

Q. How far were you from the teenagers? A. I'd say approximately 200 feet, maybe a little more, a little less.

Q. Did you actually see the hitting of one of the teenagers? A. He hit the teenager on the arm. At the time the arm went up and in this fashion. (Indicating)

Q. Do you know the name of the teenager that he hit? A. At the time he hit him, I did not know. I do not now. I understand it was one of the Landry kids. I'm not positive of this.

Q. Now, who was the party that hit the Landry kid? A. I don't know the man's name.

Q. Could you identify him if you saw him? A. I doubt it, not at that distance.

Q. You say you called the deputies; did they come immediately? A. The deputy came, oh, I would say within a half hour.

[63] It was my understanding that after I described the automobile to the Deputy on the way up the road he stopped his automobile or found this automobile.

Q. In response to your phone, was there an arrest made? A. I could not say if it was an arrest made or not. I do know that they picked the teenagers up, and the deputy come and talked to me. And the teenagers was in his automobile. After that, I'm not sure if an arrest was made or they were just being picked up or just what the score was.

MR. BUBRIG: I have no further questions.

CROSS EXAMINATION

BY MR. SOBOL:

Q. Mr. Lathum, could you see beyond the fact that this man had stopped the car and approached this group and hit a boy who turned out to be one of the Landry kids, the manner in which it was done, whether it was hard or easy or whether it was a serious attempt to hurt him or what; were you able to distinguish that? A. I seen him hit the teenager on the arm enough to [64] move his arm in an upper position.

Q. Where was the contact made on the arm? A. It was made on the arm – I mean I'm 150 feet from him, and the

teenager seemed to be standing in this fashion. And he hit him somewhere on the arm. Other than that, I couldn't exactly tell where he hit him on the arm. (Indicating)

Q. The arm that was like this went up, is that correct? (Indicating) A. That is correct.

Q. Did you actually see the man hit this boy prior to the time he hit him or did you see his arm going to hit him or did you see – was it the fact that this kid's arm flung up that led you to believe that he had been hit? A. He hit him.

Q. Did he wind up and hit him; do you have any idea? That's what I'm really getting at. A. If I would have been in the teenager's place, if the teenager wouldn't have moved in a backward position, he would have hit him harder than he did. He wouldn't have only hit him on the arm.

Q. The teenager moved backward, is that correct? A. That is correct.

[65] Q. To avoid –. A. I'm sure that anybody would.

Q. I see what you mean. A. That would be – if somebody is going to take a poke at him, that is the way he would defend himself, by moving backwards or getting out of the way.

Q. At this point the two Negro boys were in the car at the time this happened? A. The other children, the colored children?

Q. Yes. A. That is correct. And I'm pretty sure there was another person in the automobile. There were two persons in the automobile at the time it stopped.

Q. Did this other person get out? A. I don't think they did. I'm not sure.

MR. SOBOL: That's all the questions I have.

MR. BUBRIG: That's all.

(Recess)

MR. SOBOL: I call Bert Brown.

THE COURT: Has the State rested?

[66] MR. BUBRIG: The State rests, Your Honor.

BERT GRANT
ROUTE 1, BOX 181
BOOTHVILLE, LOUISIANA

after having been first duly sworn by the Clerk of Court, did testify as follows:

DIRECT EXAMINATION

BY MR. SOBOL:

Q. Bert, how old are you? A. Fourteen.

Q. And what school do you go to? A. Boothville-Venice High.

Q. When did you enter that school? A. The month that I entered?

Q. Well, approximately when, do you know? A. About a week the schools opened.

Q. Do you recall an incident on October 18th, 1966, involving the defendant, Mr. Duncan, and some boys on Route 23? A. Yes, sir.

MR. PEREZ: Excuse me. Could the witness talk a little louder?

THE COURT: [67] Yes. Will you please, so I can hear you talk where I can hear you and everybody out there – not in the audience, but these people right here can hear you?

THE WITNESS: Yes, sir.

BY MR. SOBOL:

Q. Approximately what time of day was this incident? A. About 3:30.

Q. Was it after school? A. Yes, sir, after school.

Q. Had you gone to school that day? A. Yes, sir.

Q. And what happened when you left school? A. Well, I had missed the bus, and I had to walk home.

Q. You had missed the bus? A. Yes, sir.

Q. Yes. A. And me and my friend, we was walking home.

Q. Who's your friend? A. Bernard St. Ann.

Q. Bernard St. Ann? A. Yes. And these four boys, they was on the other side of the street. They hollered at us. They said, "What you all name?" We kept walking.

[68] We didn't pay no attention to them. So, they

came on the side we were. They stopped us. They got in front of us, and they said, "We asked you your name." I said, "None of your business what my name is." They said "We just want to know your name." Then, we started arguing, and that's when Gary saw us standing up there, backed up, got out the car. He said, "What's wrong, Bert? And I said, "These boys, they want to fight." He said, "Why you all want to fight, boy?" He said, "They didn't – don't want to fight." "We just want to know his name." Then, Herman Landry, he said something, and Gary said, "Well, best out for you is to go on home." And he touched him on the elbow right there. (Indicating)

Q. Touched him on the elbow? A. We got in the car and pulled off, and Herman Landry said, "My people can put you in jail for that."

Q. Well, let's back up a little bit. Had you seen these boys before? A. Yes, sir, in school.

Q. Well, what made you say to Gary that these boys had wanted to fight, if all they had said to [69] you is what's your name? A. Because he was in the bathroom for the recess. They wanted to jump me in the bathroom. And they asked me if I wanted to fight. I said, "No, I don't want to fight." They had a gang of them wanted to jump me. And the teacher came in there and he stopped us and told me to go ahead to my class.

Q. This is in the school, now? A. Yes, sir.

Q. Were these some of the same boys? A. Yes, sir, except for one of them. This other "Ruggie," he wasn't in there. But, the other three –

MR. PEREZ: It is very difficult for me to understand, Your Honor.

THE COURT: It is for me and I'm sitting right here.

THE WITNESS: "Ruggie," and he wasn't in there. But, Herman Landry and Wayne Scarbon, they were in there.

BY MR. SOBOL:

Q. There were four boys on the road, is that correct?

A. Yes, sir, four was on the road.

[70] Q. And as far as you know, their names are Wayne Scarbon – what's the other Scarbon's name? Randolph Scarbon and the other Herman Landry and one other boy? A. Yes.

Q. How many of these four were in the group at the school? A. They had three of them in the school, in the bathroom. Westley McKernley (spelled phonetically), Herman Landry and Rudolph.

Q. Randolph? A. Rudolph – Randolph, yes.

Q. Now, when Gary touched Landry on the arm, that's a very important thing –

MR. PEREZ: If Your Honor, please, the State will request counsel for defense not to emphasize the questions to the witness, but to ask them in plain English, without emphasis and without self-serving emphasis, I might add.

MR. SOBOL: Is that a motion?

THE COURT: Proceed, Mr. Sobol.

MR. SOBOL: [71] Strike the question. I'll start again. Is that what you want, is that correct? I never heard of a request on examination – if it's an objection, perhaps it was a misphrased question. I'll phrase it again.

BY MR. SOBOL:

Q. Referring back – let me start a step further. Is the defendant a relation of yours? A. St. Ann?

Q. No, Gary Duncan? A. Yes, sir.

Q. He is related to you? A. Yes, sir.

Q. What's the relationship? A. My cousin.

Q. Your cousin? A. Yes.

Q. Now, would you describe to the Court the circumstances and the manner in which he touched or whatever he did do to Herman Landry, on the elbow? A. Well, he said like this here – (Indicating)

Q. Well, why don't you –

THE COURT: You're going to have to talk up loud.

THE WITNESS: [72] He said like this, "Best out for you to go on home," like that, on the elbow.

BY MR. SOBOL:

Q. That's all? A. That's all.

Q. Did you witness that – I mean did you hear about it or did you witness it? A. (No answer)

Q. Did you see it? A. I saw it, yes, sir.

Q. Did it look to you like Landry had been hurt? A. No, sir, he isn't.

Q. Did it look to you as though Gary was trying to hit him? A. No. I would call it an expression, the way he did it. I don't know how to explain it. But, I know he just touched him on the arm. To me, it was an expression. He just said, "Best out for you is to go on home." And he just touched him on the elbow.

Q. And what happened next? A. Well, he got in the car. Emile pushed over, and Herman Landry said, "My people can put you in jail for that."

Q. And then you drove off with Gary? A. Yes, sir.

[73] Q. And Bernard, is that correct? A. Yes, sir.

MR. SOBOL: I have no further questions.

CROSS EXAMINATION

BY MR. BUBRIG:

Q. You stated under direct examination that you knew there were three boys in the bathroom. That was also on the side of the highway? A. Yes, sir.

Q. How do you know that? A. I saw their faces.

Q. Do you know them all by name? A. I know – yes, sir, I do.

Q. Could you name them at – right now? A. Wesley McKinley, Herman Landry and Rudolph.

Q. Wasn't there four? A. There were four on the road.

Q. Did you know them at the time of the incident in the bathroom? A. Yes, sir, I knew them.

Q. You're certain? A. Yes, sir.

Q. You stated that the defendant touched or – I don't know the exact words, the Landry boy on the arm. Where were you at the time of this [74] touching? A. Inside the car, looking out the window.

Q. In which direction was the car headed? A. The car was on an angle, like right – this – the car was like that. (Indicating)

Q. Were you in the front seat or in the back seat? A. I was in the back seat, and the window was rolled down. And I was looking out the window on the side where we were.

Q. How close were they to the car? A. I'd say about from where I'm at to that thing there. (Indicating)

Q. Was Gary facing you, Gary Duncan? A. No, sir. Gary was facing the boy, and it was farther back to the car, farther in the back.

Q. In other words, Gary Duncan had his back to you? A. Yes, sir. He had his back to me.

Q. And where was the Landry boy? A. He was facing the car, and his back –

Q. He wasn't facing Gary? A. Gary was facing – he was facing from the road.

Herman Landry and Gary had his back on the car.

Q. Who had his back on the car? A. He – Gary had his back on the car. He was facing back to the car, and Herman Landry was facing the car.

[75] Q. In other words, Gary was between you and the Landry boy? A. No, sir. He was further back to the back of the car.

Q. But, you stated that the – Gary's back was towards you? A. Yes, sir. His back – he was facing the car, but he wasn't quite in front of me.

Q. Could you see Gary's face? A. No, sir. I could see the side, his face, but I didn't.

Q. Then he wasn't to the – I mean, you never had the back of the car, – if you were sitting in the car, he didn't have his back to the car, if you could see the side of his face? A. His back was to the car. But, he was further back to the car.

Q. Could you see all of the motions of his hands? A. No, sir. I saw when he touched him on the arm. That's all. That's the only time he raised his hand.

Q. In other words, you're sitting in the car, and a man has his back to the car and you could see exactly how he handled himself through the man's back. A. I could see the side of him. You see, he was to [76] the back. He

was further in the back of the car. But, I still could see from the side.

Q. You're in the back seat and the man has his back to the car, and you could see the motion of his hand in front of him? A. I could see from the side, yes.

Q. Now, you stated that Gary told something to Herman. What did he tell? A. Yes. He got out the car and he say, "Why you all want to fight?" They say, "We just want to know their names."

Gary, he said, "You don't need to know his name."

And Herman said something back, and Gary says, "Best for you is to go on home," and touched him on the elbow.

Q. Did he curse him? A. No, sir.

Q. Are you certain? A. I'm positive.

Q. You also stated that the car pulled off and then one of the boys said, "My people can put you in jail?" A. Herman Landry said that.

Q. Tell me, how could he pull off and you still here this statement? A. See, we wasn't quite on the road. We was pulling [77] off. The car hadn't "droved" off yet. We was in the car, and the motor was started. And he hollered out, he said, "My people can put you in jail for that."

Q. For what? A. For touching him on the elbow, I guess.

Q. Just touching him on the elbow? A. That's all he did.

Q. You're certain all he did was just touch him on the elbow, although the man had his back to you? A. Yes, sir.

Q. And you could see through the man? A. I could see from the side of him.

MR. BUBRIG: I have no further questions.

REDIRECT EXAMINATION

BY MR. SOBOL:

Q. I think you'd better explain – perhaps you could draw a picture of who was where so that the Court will understand how you were able to see what happened. Why don't we say that this is the road, and you take it from there. This is south and this is north, O.K.? And this is up to-

wards New Orleans, and this is south. O.K.? You understand what I'm [78] talking about? And this is the road. Why don't you draw the car. First, where was the car parked? (Indicating) A. Yes, sir, right here. (Indicating).

Q. So we understand each other, this is off the side of the road on the east side of the road? A. Right. Now, this is back. I was back here, and Gary was standing up here. And Herman Landry was up here. I could see from this side, Gary was here, and Herman Landry was standing right like that. (Indicating)

THE COURT: Where's the front of the car?

THE WITNESS: This is the front. I was back here, right here in the back of the seat on this side. (Indicating)

THE COURT: I can see.

THE WITNESS: And so, then, Gary just touched him on the arm, and he came and got in the car and then "droved" off. And he stopped like this here to see if any cars was coming – I mean he stopped like that. Herman Landry [79] hollered and said, "My people can put you in jail for that." And we just drove off. (Indicating)

MR. SOBOL: That's all the questions I have.

THE COURT: The Court has one thing that I don't think either one of you cleared up with this witness, and it's got me a little confused right now between all of the witnesses. Let's get something straight, son. When Gary Duncan backed up and he got out of the automobile –

THE WITNESS: Yes, sir.

THE COURT: – he talked to the Landry boy, I believe his name is?

THE WITNESS: He asked him why he wanted to fight.

THE COURT: At what time during this conversation did you and Bernard – Bernard is the other boy?

THE WITNESS: Yes, sir.

THE COURT: [80] What time during this conversation did you all get in the automobile?

THE WITNESS: After Gary asked him why he wanted to fight us. He said, "Why you want to fight?" We said we never. He said, "Well, you all get in the car." And

that's when Herman told him something. I don't know. I don't remember exactly what he said. But, he said something. Gary said, "It be best to go on home."

THE COURT: Now, did this take place like you and I are talking here; he told you all to get in the automobile, and then the Landry boy turned – he turned to the Landry boy and said, "Best thing for you to do is go home?"

THE WITNESS: Yes, sir. Herman told him something, and Gary told him that after he told him something.

THE COURT: This happened while you all were getting in the car?

THE WITNESS: [81] Yes, sir. I was in the car when Gary touched him on the elbow.

THE COURT: I have no further questions, gentlemen.

MR. SOBOL: That's all, Bert.

I call Bernard St. Ann.

BERNARD ST. ANN
ROUTE 1, BOX 184
BOOTHVILLE, LOUISIANA

after being first duly sworn by the Clerk of Court, did testify as follows:

DIRECT EXAMINATION

BY MR. SOBOL:

Q. Bernard how old are you? A. Sixteen.

Q. And what school do you go to? A. Boothville-Venice High School.

Q. What grade are you in? A. Seventh.

Q. Do you recall an incident on October 18th, 1966, on Highway 23, involving the defendant, Gary Duncan, and yourself and some other boys? A. Yes, sir. We was coming from the school, and those boys, four boys was coming. And they was [82] walking. And they asked us our name. And they say, "Your name Bert?" And another, the other one started laughing. And then they come on the other side of the road where we was. They got in front of us. They stopped. Then, Gary passed. He backed up,

and he said, "What's wrong?" They said, "The boys want to fight." Gary say, "What you all boys want to fight?" And the boys say, "We just want to know his name." One of them say – and then, Gary said, "You all get in the car." And Gary say, "You all best ought to go home," and just touched the boy on the arm. We got in the car and left.

Q. Who told Gary that the boys wanted to fight? A. Sir?

Q. Who told Gary, when he stopped and asked, that these boys wanted to fight? A. Bert.

Q. Was there any reason to think they wanted to fight? A. The way they was talking like, you know, they came on the same side on the road we was on.

Q. I understand – A. They came on the side of the road we was on. They got in front of us, and then they wanted to [83] fight, the way they was talking.

Q. Was there a point in which Gary told you to get in the car, his car? A. Oh, yes, sir. He said, "Get in the car."

Q. And you did? A. Yes, sir.

Q. And was that before or after he touched Herman Landry on the arm? A. It was after, I believe.

Q. It was after, you believe? A. (Nods head affirmatively)

Q. Were you outside the car when this happened, in other words, when you observed the contact – when you observed Gary touch Herman Landry you were not sitting in the car, but you were standing outside? A. Yes, we was fixing to get in the car.

Q. Where were you standing? A. I was standing on the right side, on the right side of the car.

Q. Right side of the car. The car is pointing south? (Indicating) A. (Indicating)

Q. And how far were you from Gary and Herman Landry? A. I wasn't too far, about like that, I'd say. (Indicating)

[84] Q. What did Gary say to Herman Landry before he touched him? A. He just say, "You best ought to go ahead home."

Q. Would you get up and show me exactly what he did to him? A. He just says, "Best ought to go home," just like that. That's all. (Demonstrating)

Q. Would you say that he hit him? A. No, sir.

Q. And how far away were you when that happened? A. I'd say about like from here to you, something like that, a little further.

Q. Had you been in the fight in school with these boys or any of these boys who were on the road? A. I had one that day, is all.

Q. You had had a fight that day? A. Yes, sir. A boy hit me, is all.

Q. In school? A. Yes, sir.

Q. Where did this take place? A. In the hall.

Q. It wasn't the same boys, though, was it? A. No, sir.

MR. SOBOL: I have no further questions.

CROSS EXAMINATION

[85] BY MR. BUBRIG:

Q. Bernard, you stated that one of them told – I think it was the other boy, Bert, told Gary that they wanted to fight? A. Yes, sir.

Q. What made you think they wanted to fight? A. Because the way they was talking, saying, "Your name is Bert," and was making fun of us. And while they was talking, they was coming across the road where we was, and got in front of us.

Q. In other words, because they were walking on the same side of the road you were on, walked over to the same side of the road and asked you your name, that automatically meant, to you, that they wanted to fight? A. Yes.

Q. And you just stated that you had one fight, one fight that day? A. Yes, sir.

Q. You only had one fight or more than one? A. No. I was walking – a boy hit me. That's all, one time.

Q. In other words, you were victimized? A. Uh-huh.

Q. Now, you indicated to Mr. Sobol how Gary touched [86] the Landry boy. What arm did he have contact with? A. I don't know for sure.

Q. You don't know? A. Not for sure.

Q. Are you sure that it was just a touching and not a hit? A. He didn't hit him. He just touched him.

Q. You don't know which arm? A. I don't know for sure.

Q. Are you in the car at this time or out of the car? A. I was fixing to get in.

Q. Where was Bert? A. Bert was getting in, too, I belive.

Q. Bert had not gotten into the car yet? A. I don't believe.

Q. But, you're certain that it was only a touch? A. I was sure it was just a touch.

Q. But, you don't know whether or not – you're not certain whether you were in or out; you're not certain? A. I was getting into the car.

Q. You were getting into the car? A. Yes.

Q. And Bert was still out, too, you don't recall which arm – [87] A. No, I don't.

Q. When you were getting in the car, did you open the door; were you in the process of getting in? You say you were getting in the car or were you headed towards the car? A. I was fixing to get in the car.

Q. In other words, you should have been looking where you were going, is that correct? A. Yes, sir.

Q. And if you were walking – if you were watching what you were doing, you'd be looking into the car, getting into the car? A. No. See, the door like that. And I had my head turned.

Q. In other words, you were just watching what was going on, looking and watching? A. And getting into the car.

Q. But, you definitely know that Gary had contact with the Landry boy's arm? A. He just touched him on the elbow.

Q. And you're positive of the place? A. Somewheres along here. I don't know for sure. (Indicating)

Q. You say elbow? A. Elbow.

Q. You're sure it's elbow? [88] A. One arm – it was just on his arm, I know.

Q. Did he touch it with the front of his hand or the back of his hand? A. Just like that. (Indicating)

Q. With the front? A. (Nods head affirmatively)

Q. But, you don't know which one – which arm? A. I don't know. No, I don't know for sure.

Q. Did the Landry boy ask the defendant to touch him? A. No.

MR. BUBRIG: No further questions.

REDIRECT EXAMINATION

BY MR. SOBOL:

Q. Bernard, why is it that you can't recall which arm it was? Was it because you don't recall which is right and which is left – I mean couldn't you figure that out? A. The left one, I believe.

Q. The left? A. Left.

MR. SOBOL: No further questions.

MR. BUBRIG: I have no further questions.

THE COURT: [89] Step down.

MR. SOBOL: I call the defendant, Gary Duncan.

GARY DUNCAN
BOOTHVILLE, LOUISIANA

after being first duly sworn by the Clerk of Court, did testify as follows:

DIRECT EXAMINATION

BY MR. SOBOL:

Q. Would you state your name for the record? A. Gary Duncan.

Q. You're the defendant in this case? A. Yes.

Q. Where do you live? A. Boothville, Louisiana.

Q. How old are you? A. Nineteen.

Q. And where are you employed? A. Mitch Acola. (Spelled phonetically)

Q. What do you do at that company? A. Captain.

Q. Captain of what? A. Towboat.

Q. Towboat. How long have you been working on the [90] boat? A. On the boats?

Q. How long have you been doing that? A. Oh, about three years.

Q. Three years. And you're captain of a tugboat? A. Yes.

Q. All right. Prior to your being arrested in this case, have you been arrested and charged with any crime before?

MR. BUBRIG: Objection.

MR. SOBOL: Objection?

MR. BUBRIG: I withdraw the objection.

MR. PEREZ: I may state this, if Your Honor please, if counsel for the defense is going into the defendant's character – is that the purpose?

MR. SOBOL: Sure it's the purpose.

MR. PEREZ: All right.

THE COURT: I would imagine that is what the purpose is.

[90] MR. SOBOL: Sure it's the purpose.

BY MR. SOBOL:

Q. Have you been arrested prior to the arrest in this – well, there were two arrests in this case, but prior to this case, had you been arrested and charged with any crime before? A. No, sir.

Q. And when you were arrested on this case, the first time, who posted the bond for you? A. Herbie Collette.

Q. Who is that? A. That's the owner of the boat.

Q. That's your employer? A. Yes.

Q. Do you recall the afternoon of October 18th, 1966, there was an incident involving you on Highway 23? A. Yes.

Q. Would you describe to the Court from your point of view, starting from before you got there and following through until you left, what happened? A. Well, I was heading south on Highway 23, and I seen these six boys. Two are my cousins and these [92] four white boys was

on the road. They was standing in the front of me. I stopped in the front of the cajun – this pipe company, backed up. I said, I asked Bert what's wrong. I asked Bert what's wrong. He said, "These boys want to fight." I told him to get in the car, and I told the boy, Herman Landry, I asked him – he say, "I just asked him his name." "Well, you don't suppose to ask him his name." And he say that he – when I told Bert to get in the car, and then I asked him if he wanted to know my name, and he said, say, "Yes." I said, "There it is on my shirt." I say, "You still want to know it?" He say, "Yes." I told him my name. I turned around and went to get in the car. And he say something. I turned around and say, "What you say?" And that was all of that. I told him, "You best ought to go home." I touched him on his shirt, on his right elbow. And that was all. I went and got in my car, and as I was pulling off, he said that his people would put me in jail for that.

I didn't pay no attention to him. I went and pulled off, and I think I went down the road [93] about two miles and F. J. called me. He said they wanted me at the store. I told him – he told me to park my car on the side of the road and come with him. And I went on with him. And the boy was at the store.

Q. O.K. You state right elbow, and you pointed to your left elbow. Which elbow do you mean? A. Well, I meant to say the left, because he was like this here. I meant to say the left, because my – I was facing him, and he was facing me.

Q. Why did you stop the car when you were driving on highway – A. Well, I – because I figured something was wrong, because that wasn't no – the boys habit to stand on the side of the road and talk to white boys. And I backed up and wanted to know what was going on.

Q. You knew Bert and Bernard and one was your cousin, and Bernard was someone you also knew? A. Cousin.

Q. They're both cousins? A. Yes.

Q. And your purpose in stopping was to find out what was going on? [94] A. That's right.

Q. And what was your purpose in touching Herman Landry on the arm? Why did you touch him at all? A. That was just out of an expression.

Q. Sir? A. Out of expression. I didn't mean no harm or nothing by touching him.

Q. Well, why did you touch him? A. Just expressions.

Q. How do you mean expression? A. Just tell him to go ahead on home. That's about all I could do. I told him to go ahead on home.

Q. Did you touch him hard enough to hurt him, do you think? A. No.

MR. SOBOL: I have no further questions.

CROSS EXAMINATION

BY MR. BUBRIG:

Q. Gary, you say that you're employed as a captain on a tugboat. Are you a licensed captain? A. No. A license is not necessary for the kind of work I'm doing for the boat.

Q. Are you a captain or in fact a deck hand? [95] A. I'm a captain.

Q. I asked the question since on the police report it was a deck hand. Gary, when your attorney asked you whether or not you had been arrested before or picked up before, you stated never or no? A. You say criminal or for something like this here.

I been arrested for no driver's license and for speeding, and reckless driving.

Q. How many times were you picked up for these offenses? A. Twice.

Q. Could you give the dates of these? A. I couldn't give you the date.

Q. Do you remember being picked up on April – well, let's see, let's go back to June, 1965. A. You asked me that. That's when they picked me up for no driver's license, I believe.

Q. What about April 27th – A. 27th or April 25th. That was during Easter. I wasn't picked up. I was gave a ticket.

Q. And what did you plead on that? A. Guilty – I mean at least I was guilty, but I never plead Court. I paid. I did it downstairs. Then on June 22nd they had picked me up for reckless driving.

[96] Q. Do you recall the sentence? A. Do I recall the sentence?

Q. Yes, sir.

THE COURT: Which one, Mr. Bubrig?

BY MR. BUBRIG:

Q. The last one, the last time? A. I was fined.

Q. You were given a suspended jail term upon payment of the cost of the fine? A. I don't remember.

Q. Were you not fined $100.00 and costs? A. Yes.

Q. And thirty days? A. I don't remember the thirty days.

Q. The thirty days was suspended. Did you, when you stopped at the scene, have any reason to stop there other than seeing six teenagers? A. The reason I stopped was the boys was standing on the side of the road, Bert and Bernard.

Q. You stopped every time and see Bert and Bernard on the side of the road? A. If I see them walking on the road, yes. If I see them on the road, yes, I'm going to stop. I'll stop.

Q. Is that the reason you stopped, just because they [97] were on the side of the road? A. That was one of the reasons, and the other reason was because the four boys was there. And I asked them what was wrong.

Q. Why would the presence of four boys make you stop on the side of the road? A. I figured something was wrong, because they wasn't in the habit of standing on the side of the road and talking to nobody, and you know, they wasn't supposed to be on the road.

Q. Why weren't they supposed to talk to anybody? A. Why they wasn't supposed to talk to nobody?

Because they was supposed to be home.

Q. Did you threaten the four white boys that were on the side of the road? A. No.

Q. You didn't tell them anything? A. No.

Q. In other words, those three boys, all three of them were lying when they took the stand? A. They were lying when they said I threatened them, and that I was meaning to hurt the boy when I touched him on the arm. I feel that fairly, before, if I wanted to hurt him I could have hurt him, and I ain't never had no intention [98] to hurt him.

Q. Did he consent to your touching him on the arm? A. Did he consent?

Q. Did he say, "Go ahead and hit me?" A. No.

Q. And did you have contact with him in any way? A. Yes. I had contact with him.

Q. Really, you weren't guiding him as you might walk this way, is that right; didn't you kind of hit him backhand, and tell him to get out of here? A. I touched him with my hand. I said, "You might as well go on home."

Q. How did you touch him with your hand? A. What?

Q. How did you touch him with hour hand? A. The flat part of my hand.

Q. How did you touch him? A. On his elbow.

Q. You're certain it was his elbow? A. I'm positive.

Q. It couldn't have been a little higher? A. No.

Q. Where were the boys, the two boys you stopped to pick up when this happened? A. Where was they?

[99] Q. Yes. A. On the side of the road, in the front – on the front, the little fish, and speedway.

Q. They were in the car? A. What?

Q. They were in the car, Bernard and Bert? A. Yes. They was in the car.

Q. Well, then, your witness was lying?

MR. SOBOL: Your Honor, I object to the question about who was lying and who is not.

MR. BUBRIG: It is his own witness.

MR. SOBOL: Your Honor, I object to asking questions of that type, both as to his witnesses and eye witnesses. The witness is supposed to testify to the best of his recollection, not categorize anybody else's testimony.

THE COURT: There's another way to ask the question. I'll sustain the objection.

BY MR. BUBRIG:

Q. Was your witness telling the truth? A. Yes, he was telling the truth. I failed to [100] believe that he got a little confused with your asking him questons that would confuse him. (Sic)

Q. Why would it confuse Bernard? A. Why it would confuse him?

MR. SOBOL: Your Honor, I object to the question of why it would confuse Bernard.

THE COURT: That question is in response to an answer by the defendant.

MR. SOBOL: The defendant obviously didn't know why Bernard is concerned. I think the question about whether somebody else is lying or telling the truth is an improper question, and I object to it.

MR. PEREZ: If Your Honor please, the State will withdraw those questions. This is not a trial by Jury, but the Court has the same right to judge a witness, as does a Jury, as to whether or not he's telling the truth.

THE COURT: The question has been withdrawn.

[101] MR. PEREZ: Yes.

MR. SOBOL: The objection is now moot.

BY MR. BUBRIG:

Q. Then, Bernard may have been a little confused about what went on? A. Yes.

BY MR. PEREZ:

Q. Duncan, you had stated in response to the questions asked by your attorney, that you had never been in trouble before, and then Mr. Bubrig asked you, and he recalled to you that you were charged on three different occasions, is that correct, isn't it? A. I failed to believe I understand. My lawyer asked me if I was ever picked up for something like this here before. He didn't say nothing about no traffic tickets, traffic violations. (Sic)

Q. And you also stated that for how many years you've been a captain on this tugboat? A. He asked me how many years I been working on a boat.

Q. Yes. [102] A. I told him about three years. He never asked me how long I been a captain on a boat.

Q. What was your occupation or what were your duties on these boats for three years? A. I was deck hand sometimes and I was captain. Now, on this boat here that I am working on here, now, when they first picked me up for this, I was working deck hand.

Q. Well, is it – A. Now, I'm working captain.

Q. Is it not true when you were arrested on April 26th, 1965, that Deputy Simmons asked you your occupation, and you told him that you were a fisherman? A. Yes.

Q. And I ask you also, is it not true that the reason for your being picked up was that Deputy Simmons was notified by a passing motorist that you were driving a 1955 Pontiac, blue and white automobile, with an Alabama license, and had passed this motorist in a curve about ninety miles an hour, is that correct? A. No. Explain yourself again about that?

Q. Well, I'll ask the question in another way. Did not Deputy Simmons advise you that the reason [103] he picked you up on April 26th, 1965, that a motorist, a passing motorist advised the Deputy that you had passed him in a curve at a speed of ninety miles an hour. Did Deputy Simmons tell you that?

MR. SOBOL: Your Honor, I object to that question on the grounds that it calls for hearsay evidence.

THE COURT: Hearsay evidence?

MR. SOBOL: Hearsay, what the Deputy said to him.

THE COURT: This is the defendant.

MR. SOBOL: It's not what he said. It's what the Deputy said.

MR. PEREZ: If Your Honor please, any statement made in the presence of the defendant is admissible.

MR. SOBOL: That's just not right. Any statement by the defendant is admissible. Any statement to the defendant is for that reason –

[104] MR. PEREZ: If Your Honor please, this is –

THE COURT: This has nothing to do with this.

MR. PEREZ: With this particular case, I know, but the defendant is – his counsel has gone into the character of the defendant, and for that reason I am asking these questions. And once the defendant does that, the whole case is open to the State.

MR. SOBOL: The hearsay rule is waived, because I have gone into the character of the defendant?

THE COURT: The hearsay rule is not waived. I don't see where this is hearsay.

MR. SOBOL: What the Deputy said to the defendant is exactly what hearsay is. I don't object to the line of questioning. I have opened it up. They have a right to pursue it, but they have a right to pursue it within the rules of evidence. This is, I think, obviously hearsay evidence, and [105] I'll object to it.

MR. PEREZ: If Your Honor please, I withdraw the question and rephrase it.

BY MR. PEREZ:

Q. Do you recall Deputy Simmons advising you how or for what reason he arrested you on April 26th, 1965? A. Oh, he arrested me for no driver's license, but he told me that a car, a person had said I run him off the road. But, that wasn't true.

Q. Now, at eleven minutes after midnight on July 5th, 1966, were you arrested by Deputy Buras? A. Yes.

Q. And did you at the time give your occupation as a fisherman? A. Yes, at that time I was fishing.

Q. And is it not true that Deputy Buras advised you that while he was patrolling on Highway 23, he observed two subjects racing, headed south; that he turned around and caught you after clocking you at ninety miles per hour.

MR. SOBOL: Your Honor, I object to the question on the same grounds as the prior objection, presently.

[106] MR. PEREZ: I'll rephrase the question. I will withdraw the question and rephrase it.

BY MR. PEREZ:

Q. Were you not charged with speeding at ninety miles an hour on that particular date? A. Yes, I was. That's what I was charged with.

Q. And did you not plead guilty to that charge, and you were sentenced to $100.00 and costs, and given thirty days? A. Yes.

Q. And you were given thirty days in jail, and the sentence was suspended? A. I was charged $110.00, yes.

Q. And is it not true that Deputy Buras apprehended you after you had parked your car in a friend's yard, and you ran home; is that not true? A. No. I was in the bed when he came. I wasn't trying to run from him or nothing.

Q. And is it not true that the other person with whom you were racing, Deputy Buras had gotten information from him? A. Deputy Buras talked with him.

Q. Now, you stated that you did touch this Landry boy on the arm, is that correct? [107] A. That is correct.

Q. Did he ask you to touch him on the arm? A. I belive I told the attorney that he did not told me.

Q. He did not. So, you touched him on his arm without his consent or permission, is that correct?, A. That is correct.

MR. PEREZ: No further questions.

REDIRECT EXAMINATION

BY MR. SOBOL:

Q. Gary, the question I asked you is whether you had been arrested and charged with a crime, and your answer was no. And you don't want to change that answer, do you? A. Explain that.

Q. You have not been arrested and charged with a crime, have you? A. That's right, yes, sir.

Q. Yes, sir, you have not been? A. That's right.

MR. SOBOL: No further questions.

MR. PEREZ: Well, in response to that I'll have to ask one [108] question or I'll reserve it for argument, if Your Honor please.

MR. SOBOL: The defense rests.

THE COURT: Step down.

MR. PEREZ: The State rests.

(Argument by counsel)

THE COURT: Mr. Sobol, you brought out an interesting point in your closing argument; a very interesting point. The Court will take into consideration in deciding this matter, your client, in passing up six kids – I call them kids. They are under the age. They are all under the age of seventeen, other than Leonard – I think Leonard said he was sixteen. They were all under the age of seventeen. So, they're all kids under the eyes of the Court.

At the time that this incident happened, things were of such a nature in that end [109] of the Parish – we should take that into consideration.

The fact that six boys were standing on the side of the road would mean nothing to anyone who would be driving by. I think the fact that it was four white boys and four colored boys – I have witnessed this myself, and I am sure you have on many occasions. I'm sure the defendant has, where there are conversations on the side of the road between white boys and colored boys; however, you described the civil law definition of battery. The Court is well aware of it, a mere touching. But, you have something else here, the prankish tap of one by another, not in anger, but in skylarking, and both being friends, is not an assault and battery. This was in two cases cited in the Code under Section 33. And in these two cases it said every touching or holding, however trifle of another person, or his clothes, an angry resentual, rude or insolent or hositle manner shall be battery, as defined in the Code under [110] the Revised Statute Title 14, Section 33.

The two witnesses for the defense, one witness stated he was in the back of the car, and they were behind, further back from the car, yet he saw what went on. The other witness takes the stand that neither one of them were in the car, that they were getting in the automobile, and Mr. Lathum testified that he was 150 to 200 feet away, yet he saw the blow. And he say the boy's arm go up in the air

from the blow. And he stated that if the boy would not have backed up, it would have been even more serious.

The Court taking into consideration Mr. Lathum's testimony, a man who was not even in the discussion, or whatever we may call it between six boys on the side of the street, and the testimony of the victim himself, Mr. Landry, that this blow was sufficient to sting him, I think the State for those reasons has proved to me beyond a reasonable doubt that the defendant is guilty of simple [111] battery.

Will you stand up, Gary Duncan.

(Defendant complies with the Court's order)

THE COURT: The Court is going to find you at this time —

MR. SOBOL: Your Honor, we'd like to have a delay.

THE COURT: I will give you a delay between the verdict and the sentencing. I'm going to render my verdict now.

MR. SOBOL: I see.

THE COURT: Under the law, you must wait a minimum of twenty-four hours before sentencing, unless it's so specifically waived. Is that what you mean?

MR. SOBOL: Yes, sir.

THE COURT: If you don't waive your delays, I can't sentence him this afternoon.

The Court at this time finds you guilty of the crime of simple battery. The Court [112] will at your request — you do not wish to be sentenced this afternoon. You want a delay?

MR. SOBOL: Yes.

THE COURT: The Court will delay sentencing until next week at 10:30.

MR. SOBOL: If Your Honor please, if we could have it Wednesday afternoon, because I have an argument in the Federal Court in New Orleans —

THE COURT: Wednesday when?

MR. SOBOL: After lunch, about two o'clock?

THE COURT: I said ten-thirty, because that's the time Court starts.

MR. SOBOL: Could we make it at two?

THE COURT: Two o'clock would be fine. That's next Wednesday, February 1st.

MR. PEREZ: [113] If Your Honor please, this defendant is presently out on bond. Is that not correct? Is there a bond posted in this matter?

THE COURT: There is bond on him, yes, sir.

MR. PEREZ: Is it not so that he –

THE COURT: Not until sentencing, Mr. Perez.

MR. PEREZ: I see.

THE COURT: If I would have sentenced him and then delayed the execution of the sentence, then the bond would would then have to be posted, but not now. The bond is still in force and effect until the sentence is rendered.

Be back here next Wednesday at one or two o'clock.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 410

GARY DUNCAN,
*Appellant,*

v.

STATE OF LOUISIANA,
*Appellee.*

***On Appeal From the Supreme Court of Louisiana.***

## *JURISDICTIONAL STATEMENT*

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July, 1967.

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GARY DUNCAN,

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***On Appeal From the Supreme Court of Louisiana.***

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## *JURISDICTIONAL STATEMENT*

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### *THE OPINIONS BELOW*

The Memorandum Decision of the Supreme Court of Louisiana is reported at 250 La. 253, 195 So. 2d 142, and appears herein as Appendix A. No other written opinions have been delivered.

### *STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED*

(i) This is a criminal prosecution against the appellant, Gary Duncan. Appellant was charged and convicted in the Twenty-Fifth Judicial District Court of Louisiana of simple battery in violation of Louisiana Revised Stat-

utes, Section 14:35. (R. 1)[1] Simple battery is defined as a battery without a dangerous weapon. Article 779 of the Code of Criminal Procedure of Louisiana denies a jury trial on that charge. Appellant contended that Article 779 is invalid because it is repugnant to the Sixth and Fourteenth Amendments to the Constitution of the United States. The decision of the Supreme Court of Louisiana was in favor of the validity of Article 779.

(ii) The judgment or decree sought to be reviewed is the ruling of the Supreme Court of Louisiana denying appellant's application for a writ of certiorari. (R. 31). That ruling was issued on February 20, 1967 and entered on March 6, 1967. No petition for rehearing was filed. The Notice of Appeal was filed in the Twenty-Fifth Judicial District Court of Louisiana, the court possessed of the record, on May 15, 1967. (R. 33). On July 6, 1967, Honorable Joe W. Sanders, Associate Justice of the Supreme Court of Louisiana, extended appellant's time to docket the appeal in this Court to July 24, 1967.

(iii) Jurisdiction of the appeal is conferred on this Court by Title 28 of the United States Code, Section 1257(2).

(iv) Cases sustaining the jurisdiction of this Court are:

*Application of Gault*, 87 S. Ct. 1428 (1967);
*Giaccio v. Pennsylvania*, 382 U.S. 399 (1966);
*Hoyt v. Florida*, 368 U.S. 57 (1961);
*Ferguson v. Georgia*, 365 U.S. 570 (1961).

(v) The validity of Article 779 of the Louisiana

[1] "R." references are to the record on appeal.
"Tr." references are to the official transcript of the testimony in the trial court which has been filed with the record in this Court.

Code of Criminal Procedure is here involved. The full text of that article is as follows:

> Art. 779. Trial of Misdemeanors.
>
> A defendant charged with a misdemeanor shall be tried by the Court without a jury.[2]

Misdemeanors in Louisiana are all crimes not punishable at hard labor. LA. REV. STAT. 14:2 (1950). This includes at least one offense punishable by up to ten years imprisonment. LA. REV. STAT. 14:34.1 (Cum. Supp. 1962). In this case, the maximum sentence provided by the statute is two years imprisonment plus a $300 fine. LA. REV. STAT. 14:35 (1950).

## *QUESTION PRESENTED BY THE APPEAL*

The following question is presented by this appeal:

Does a state statute that denies the right to trial by jury in a prosecution for battery, where a two year prison term may be imposed, violate the Sixth and Fourteenth Amendments to the United States Constitution?

## *STATEMENT OF THE FACTS OF THE CASE*

Gary Duncan, appellant herein, is a citizen of the United States, a Negro, and a resident of Plaquemines Parish, Louisiana. On December 5, 1966, appellant was charged with simple battery in a bill of information filed in the Twenty-Fifth Judicial District Court of Louisiana. (R. 1) In Louisiana, simple battery is a crime punishable by a term of two years imprisonment and a fine of $300. LA. REV. STAT. 14:35 (1950). Because simple battery is not punishable by imprisonment at hard labor, the crime is categorized as a "misdemeanor" at state law. LA. REV.

[2] Article 779 is consistent with Section 7, Article 41 of the Louisiana Constitution. The provisions of Louisiana law relating to trial by jury are set forth in Appendix C.

STAT. 14:2 (1950). Article 779 of the Code of Criminal Procedure of Louisiana in express terms denies the right to trial by jury in misdemeanor cases.[3]

On January 25, 1967, prior to trial in the state court, appellant filed a "Demand for Trial by Jury," in which he contended that the right to trial by jury on the charge against him was secured by the Sixth and Fourteenth Amendments to the United States Constitution. (R. 3) The demand was rejected by the trial judge on the authority of Article 779 of the Louisiana Code of Criminal Procedure. (R. 7; Tr. 3) Appellant reserved a bill of exception in the manner provided by Louisiana law. (R. 5) Appellant was then tried before a judge, without a jury.

The charge against appellant was based on an incident involving his two young cousins, Bert Grant and Bernard St. Ann, and four white boys. In the fall of 1966, pursuant to an order for desegregation issued by the United States District Court in New Orleans,[4] Grant and St. Ann transferred to the previously all-white Boothville Venice School in Plaquemines Parish. (See Tr. 11, 66, 81) Thereafter, these boys were physically assaulted, threatened and otherwise harassed by white students in the school. (Tr. 8, 13, 27, 69) On October 18, 1966, as appellant was driving home on U.S. Highway 23, near the Boothville Venice School, he observed Grant and St. Ann confronted by a group of white boys. (See Tr. 21) He stopped his car and asked his cousins what was going on. Grant replied that the white boys wanted to fight. (Tr.

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[3] The legislative categorization of common law offenses as "misdemeanors" or "felonies" is irrelevant for purposes of interpreting the Sixth Amendment jury trial guarantee. Callan v. Wilson, 127 U.S. 540, 549 (1888). Moreover, the crime defined by LA. REV. STAT. 14:35 (1950) is a felony under federal standards. 18 U.S.C. § 1.

[4] United States v. Plaquemines Parish School Board, 11 Race Rel. L. Rep. 1764 (E.D. La. Aug. 26, 1966).

82, 92) Appellant told his cousins to get into his car. (Tr. 26, 82, 92) At the trial, the white boys and a white onlooker some distance away testified that after the Negro boys went to appellant's car, appellant slapped one of the white boys on the elbow. (Tr. 7, 27-28, 52, 62-63) Appellant and his cousins each testified that appellant had not slapped the boy, but had merely touched him on the arm, as a manner of expression, while telling him that it would be best if he went home. (Tr. 72, 84, 92)

The trial judge resolved the factual dispute against the appellant and found him guilty as charged. (R. 2) On February 1, 1967, appellant perfected a formal bill of exception on the jury trial issue, in accordance with state procedure. (R. 5, 10) He was then sentenced to sixty days in prison and a $150 fine, with the proviso that if the fine and costs are not paid, an additional twenty day sentence shall be served. (R. 2)

On February 6, 1967, appellant filed in the Supreme Court of Louisiana an application for a writ of certiorari to review the judgment below, and specifically the ruling of the court on appellant's demand for trial by jury. (R. 11) In the application, appellant expressly argued that Article 779 of the Louisiana Code of Criminal Procedure is "unconstitutional on its face", under the Sixth and Fourteenth Amendments of the United States Constitution, "insofar as it denied [appellant] the right to trial by jury in this case." (R. 18) On February 20, 1967, the Supreme Court of Louisiana denied appellant's application for a writ of certiorari. (R. 31) The Memorandum Decision stated: "No error of law in the ruling complained of." 250 La. 253, 195 So. 2d 142 (1967); Appendix A. The Supreme Court of Louisiana is the highest court in the State of Louisiana.

On February 21, 1967, the trial court set bond at $1,500, pending disposition of this matter in this Court. Appellant is free on bond.

## *THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL*

If this case had been tried in a federal court, the appellant unquestionably would have been entitled to trial by jury.[5] Thus, this appeal squarely raises the question of the applicability of the jury trial guarantee of the Sixth Amendment to serious state criminal proceedings.

### (i) *This Court's Earlier Refusal to Apply the Sixth Amendment Jury Trial Guarantee to the States Was Based on Interpretation of the Fourteenth Amendment That Has Long Been Abandoned*

Almost seventy years ago, in *Maxwell v. Dow*, 176 U.S. 581 (1900), this Court held that the Fourteenth Amendment does not make applicable to the states the specific guarantees of the Sixth Amendment. The Court stated that the mandate of due process of law is satisfied whenever a defendant is tried according to established

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[5] In federal proceedings, this Court has interpreted the Sixth Amendment jury trial guarantee to be applicable to the trial of all "crimes," but not to the trial of "petty offenses." Cheff v. Schnackenberg, 384 U.S. 373 (1966); District of Columbia v. Clawans, 300 U.S. 617, 624 (1937); District of Columbia v. Colts, 282 U.S. 63 (1930); Callan v. Wilson, 127 U.S. 540, 557 (1888). It is clear that simple battery, as defined by Louisiana Revised Statutes 14:35, is a crime, and not a petty offense, regardless of whether the test is a potential maximum term of imprisonment of more than six months (18 U.S.C. §1; Cheff v. Schnackenberg, *supra*, 384 U.S. at 379-80), or an offense indictable at common law, District of Columbia v. Colts, *supra*, 282 U.S. at 73; *Callan v. Wilson*, *supra*, 127 U.S. at 554-57. The maximum sentence under the statute is two years imprisonment. Moreover, battery was an indictable offense at common law. III BLACKSTONE, COMMENTARIES *121; IV *Id.* at *6, 216-17; I CHITTY, CRIMINAL LAW 138-40 (1819); I RUSSELL, CRIMES AND MISDEMEANORS *60 (1819); II HAWKINS, PLEAS OF THE CROWN 17 (7th ed. 1795). In jurisdictions applying the common law or Sixth Amendment standard, a defendant charged with battery has consistently been guaranteed the right to trial by jury. *In Re* Robinson, 20 D. C. 570, 572 (Sup. Ct. D. C. 1892); State v. Stewart, 89 N. Car. 563, 564 (1883); Work v. State, 2 Ohio St. 296 (Sup. Ct. 1853).

and uniform procedures within a state. 176 U.S. at 602-05. *Accord, West v. Louisiana*, 194 U.S. 258, 264 (1904). Accordingly, in *Maxwell* the Court sustained the use of an eight man jury in a state criminal proceeding, although two years earlier, in *Thompson v. Utah*, 170 U.S. 343 (1898), the Court had held that the Sixth Amendment prohibits the use of a jury of less than twelve in federal criminal trials. The jury trial question has not since been considered by the Court, although in cases involving other issues there have been statements that a jury trial in state criminal cases is not secured by the Fourteenth Amendment. See, *e.g.*, *Fay v. New York*, 332 U.S. 261, 288 (1947); *Palko v. Connecticut*, 302 U.S. 319, 324 (1937); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).[6]

In recent years, however, the Court has held applicable to state criminal proceedings every guarantee of the Sixth Amendment, except the right to trial by jury. See *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (speedy trial); *In re Oliver*, 333 U.S. 257 (1948) (public trial and notice of the accusation); *Irwin v. Dowd*, 366 U.S. 717 (1961) (impartial jury); *Pointer v. Texas*, 380 U.S. 400 (1965) (confrontation); *Washington v. Texas*, 87 S. Ct. 1920 (1967) (compulsory process); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel).[7]

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[6] The applicability to state criminal proceedings of the Sixth Amendment jury trial guarantee has thus never been considered in the context of a complete denial of trial by jury. See Maxwell v. Dow, *supra*, 176 U.S. at 612 (Mr. Justice Harlan dissenting).

[7] These decisions are part of a broader trend toward the application to state criminal trials of rights secured by the Bill of Rights. See Ker v. California, 374 U.S. 233 (1963) (Fourth Amendment standard of legality of searches without a warrant); Aguilar v. Texas, 378 U.S. 108 (1964) (Fourth Amendment standard for the issuance of a search warrant); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusion of illegally seized evidence); Malloy v. Hogan, 378 U.S. 1 (1964) (Fifth Amendment protection against self-incrimination); Robinson v. California, 370 U.S. 660 (1962) (Eighth Amendment protection against cruel and unusual punishment); Pilkinton v. Circuit Court, 324 F. 2d 45 (8th Cir. 1963) (Eighth Amendment protection against excessive bail).

These cases have completely undermined the rationale of *Maxwell* by broadly rejecting the proposition that the guarantees of the Sixth Amendment do not apply in state criminal proceedings. In fact, the language of the more recent decisions suggests that all Sixth Amendment rights are applicable in state courts. In *Washington v. Texas, supra*, Mr. Chief Justice Warren, writing for eight members of the Court, stated:

> At one time, it was thought that the Sixth Amendment had no application to state criminal proceedings [citing *West v. Louisiana*, 194 U.S 258, 264 (1904)]. That view no longer prevails, and in recent years we have increasingly looked to the specific guarantees of the Sixth Amendment to determine whether a state criminal trial was conducted with due process of law.[8]

And in *Pointer v. Texas, supra*, Mr. Justice Black, for the Court, stated:

> In light of *Gideon*, *Malloy*, and other cases cited in those opinions holding various provisions of the Bill of Rights applicable to the states by virtue of the Fourteenth Amendment, the statements made in *West* and similar cases generally declaring that the Sixth Amendment does not apply to the States can no longer be regarded as the law.[9]

See *Parker v. Gladden*, 385 U.S. 363 (1966).[10] In light of these decisions rejecting the rationale of *Maxwell*, it

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[8] 87 S. Ct. at 1922.

[9] 380 U.S. at 406.

[10] "We believe that the statements of the bailiff to the jurors are controlled by the command of the Sixth Amendment, made applicable to the States through the Due Process Clause of the Fourteenth Amendment. It guarantees that 'the accused shall enjoy the right to a . . . trial, by an impartial jury . . . [*and*] be confronted with the witnesses against him. . . .'"

385 U.S. at 364 (Emphasis added).

is appropriate that the specific holding of *Maxwell* should now be reconsidered by the Court.[11]

### (ii) *The Right to Trial by Jury in Criminal Cases Is Basic to Anglo-American Concepts of Due Process of Law*

#### a. *Historical Antecedents of the Right to Trial by Jury*

In deciding to apply specific guarantees of the Bill of Rights to state criminal proceedings, the Court has emphasized the significance accorded these rights in the heritage of the English law. *E.g., Klopfer v. North Carolina, supra,* 386 U.S. at 223-26; *Pointer v. Texas, supra,* 380 U.S. at 403-05.

Trial by jury in criminal cases was recognized as a fundamental safeguard of individual liberties centuries before the adoption of the American Constitution. The right is traceable to the earliest Saxon colonies,[12] and constituted one of the fundamental articles of the Magna Charta: "No freeman shall be taken or imprisoned, or be

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[11] See note 6, *supra.* The applicability of the Sixth Amendment jury trial guarantee to the states has been recognized in the lower federal courts as an important, but unsettled question. In Randel v. Beto, 354 F. 2d 497 (1965), the United States Court of Appeals for the Fifth Circuit held that a habeas corpus petitioner's claim based on application of the Sixth Amendment jury trial guarantee to state proceedings was an "important question . . . of constitutional law," entitling petitioner to a hearing. 354 F. 2d at 501. In United States, *ex rel.* Gerchman v. Maroney, 355 F. 2d 302 (3d Cir. 1966), Judge Freedman suggested that past statements in this Court concerning the applicability of the jury trial guarantee to the states "are not . . . flatly decisive of the question," in light of the recent decisions holding other guarantees of the Bill of Rights applicable to state proceedings. 355 F. 2d at 313. Judge Freedman refrained from passing on the issue, because the case was disposed of on other grounds, and because he thought it "not unlikely that we may soon have an authoritative expression on the subject from the Supreme Court". 355 F. 2d at 315. The other members of the panel thought the question foreclosed by decisions of this Court. 355 F. 2d at 315-16.

[12] III BLACKSTONE, *op. cit. supra,* at *349; PERRY, SOURCES OF OUR LIBERTIES, 7-9 (1959).

disseised of his freehold, or liberties . . . but by the lawful judgment of his peers. . . ." Magna Charta, ch. 39, translated and quoted in COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 45. (Brooke's 5th ed. 1797). Blackstone described the right to trial by jury in criminal cases as "the most transcendent privilege which any subject can enjoy, or wish for." III BLACKSTONE, *op. cit. supra*, at *379.[13] In his discussion of trial by jury, Lord Coke stated that this "ancient" form of trial "excells [all] others." I CO. LITT. *155b. The guarantee of trial by jury in criminal cases was included in the English Bill of Rights of 1689,[14] which served as one of the basic sources for the Bill of Rights to the United States Constitution. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776-1791 p. 19 (1955).

The right to trial by jury in criminal cases was fundamental to the American colonists. Indeed, Parliamentary infringement of this right was one of the major grievances of the colonists against British rule. *E.g.*, John Adams, *Instructions of the Town of Braintree, Massachusetts on the Stamp Act* (October 14, 1765);[15] Resolution No. 5, Declaration and Resolves of the First Continental Congress

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[13] ". . . [T]he liberties of England cannot but subsist, so long as the *palladium* . . . [of trial by jury] remains sacred and inviolate; not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations which may sap and undermine it; by introducing new and arbitrary methods of trial by justices of the peace, commissioners of the revenue, and courts of conscience. And however convenient these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern."

IV BLACKSTONE, *op. cit. supra*, at *349-50.

[14] I Will. III and Mary II, sess. 2, c. 2 (1689), para. 11.

[15] Reprinted in COMMAGER, DOCUMENTS OF AMERICAN HISTORY 56-57 (5th ed. 1949).

(October 14, 1774);[16] The Declaration of Independence (July 4, 1776).[17]

Between the War of Independence and the formation of the American Union, constitutions were adopted by eleven of the former Crown colonies. Without exception, these documents guaranteed trial by jury in criminal cases, after the pattern of English law.[18] The importance of trial by jury at this period in our history is further evidenced by the fact that it is one of the few individual rights included in the body of the United States Constitution, Art. III, Section 2. See THE FEDERALIST No. 83 (Hamilton). It is the only such provision that is reiterated in the Bill of Rights.

In his treatise on the Constitution published in 1833, Mr. Justice Story reflected the contemporary view of the "antiquity" and "importance of trial by jury in criminal cases."

> It was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties, and watched with an unceasing jealousy and solicitude. The right constitutes one of the fundamental articles of Magna Charta. . . . When our more im-

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[16] Reprinted in *Id.* at 82-83.

[17] Reprinted in *Id.* at 100-02.

[18] See THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS, V, 2594-98 (1909) (New Jersey Constitution of 1776); Ibid., V, 2623-38 (New York Constitution of 1777); Ibid., VI, 3248-57 (Constitution of South Carolina of 1778); Ibid., II, 777-85 (Constitution of Georgia of 1777); Ibid., VII, 3812-14 (Constitution of Virginia of 1776, Sec. 8); Ibid., V, 3081-84 (Constitution of Pennsylvania of 1776, Sec. IX); Ibid., III, 1686-91 (Constitution of Maryland of 1776, Sec. XIX); Ibid., V, 2787-89 (Constitution of North Carolina of 1776, Sec. IX); Ibid., III, 1888-93 (Constitution of Massachusetts of 1780, Pt. 1, Sec. 12); Ibid., IV, 2453-57 (Constitution of New Hampshire of 1784, Art. I, Sec. 15); I Laws of the State of Delaware, 1700-1797, App. 1981 (New Castle, 1797) (Delaware Declaration of Rights of 1776, Sec. 14). In addition, Vermont, which had not been recognized as a Crown Colony, included the jury trial guarantee in its Constitution of 1777. THORPE, *op. cit. supra*, VI, 3737-42.

> mediate ancestors removed to America, they brought this great privilege with them, as their birthright and inheritance, as a part of that admirable common law, which had fenced round and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our state constitutions as a fundamental right, and the constitution of the United States would have been justly obnoxious to the most conclusive objection, if it had not recognized and confirmed it in the most solemn terms.[19]

The history of the right to trial by jury and its reception in this country clearly establish that it is one of the basic rights preserved by our Constitution.

b. *Recognition by this Court of the Fundamental Importance of Trial by Jury in Criminal Cases*

This Court has given vigorous expression to the fundamental role of trial by jury in our system of law. In *Irwin v. Dowd*, 336 U.S. 717 (1961), the Court stated:

> England, from whom the Western world has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, *the most priceless of which is that of trial by jury.* This right has become as much American as it was once the most English. Although this Court has said that the Fourteenth Amendment does not demand the use of jury trials in a state's criminal procedure, Fay v. New York, 332 U.S. 261; Palko v. Connecticut, 302 U.S. 319, every state has constitutionally provided trial by jury. . . . *In the ultimate analysis, only the jury can strip a man of his liberty or his life.*[20]

See *Turner v. Louisiana*, 379 U.S. 466, 471-73 (1965).

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[19] 2 Story, Constitution of the United States 527 (2d ed. 1851).

[20] 366 U.S. at 721-22 (Emphasis added).

In *Cheff v. Schnackenberg*, 384 U.S. 373 (1966), this Court ruled that even in criminal contempt cases, where there is considerable question about the practice at common law,[21] a sentence in excess of six months, the statutory maximum for "petty offenses",[22] may not be imposed by a federal court without trial by jury. Last term, in *Bloom v. Illinois*, the Court granted certiorari to consider whether the rule articulated in *Cheff* was applicable, by virtue of the Fourteenth Amendment, to criminal contempt proceedings in state courts.[23]

The Court has shown its concern for the integrity of trial by jury in a long line of decisions, dating back to *Strauder v. West Virginia*, 100 U.S. 303 (1880), invalidating the systematic exclusion of Negroes from grand and petit juries. *E.g.*, *Norris v. Alabama*, 294 U.S. 587 (1935); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Eubanks v. Louisiana*, 356 U.S. 584 (1958). In recent years, this Court and the lower federal courts have further secured the common law mandate that no man be convicted other than by a "judgment of his peers"[24] by insisting that juries in state and federal courts be selected in a manner that will ensure a representative cross section of the community on venire lists. *E.g.*, *Whitus v. Georgia*, 385 U.S. 545 (1967) (exclusion of Negroes); *Hernandez v. Texas*, 347 U.S. 475 (1954) (exclusion of Mexican-Americans); *Labat v. Bennett*, 365 F. 2d 698 (5th Cir. 1966) (en banc), *cert. denied*, 386 U.S. 991 (1967) (exclusion of wage earners); *White v. Crook*, 251 F. Supp. 401 (M. D. Ala. 1966) (three judge court) (exclusion of

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[21] Compare Barnett v. United States, 376 U.S. 681, 701-24 (1964) (Appendix to Opinion of the Court), with id. at 740-51 (dissenting opinion of Mr. Justice Goldberg).

[22] 18 U.S.C. § 1.

[23] No. 1070, October 1966 Term, 87 S. Ct. 1346 (1967).

[24] Magna Charta, ch. 39, *supra*.

women).[25] See *Schowgurow v. State*, 240 Md. 121, 213 A. 2d 475 (1965) (exclusion of atheists). The right of a defendant to a jury reflecting a fair cross section of the community has been held to apply where there is no proof of actual prejudice to the defendant, *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Strauder v. West Virginia*, *supra*, 100 U.S. at 309, and where the defendant is not a member of the class excluded, *Allen v. State*, 110 Ga. App. 56, 137 S.E. 2d 711 (1964); *State v. Madison*, 240 Md. 265, 213 A. 2d 880 (1965). See *Labat v. Bennett*, *supra*, 365 F. 2d at 723, n. 43.

Further, this Court has repeatedly struck down state court convictions, where it appeared that jurors had been exposed to prejudicial newspaper publicity, or other influences inimical to the defendant. *Parker v. Gladden*, *supra* (remarks of bailiff); *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966) (newspaper publicity); *Estes v. United States*, 381 U.S. 532, 545 (1965) (broadcasting of trial); *Irwin v. Dowd*, *supra* (newspaper publicity); *Moore v. Dempsey*, 261 U.S. 86 (1923) (mob domination).

It would be ironic indeed if a state were permitted to nullify this Court's carefully developed protections of the jury system by substituting for trial by jury trial by a single judge, who cannot represent a fair cross section of the community and who is frequently exposed to official and unofficial influences prejudicial to the defendant.

c. *Recognition by the States of the Fundamental Importance of Trial by Jury in Criminal Cases*

It is a further measure of the importance accorded trial by jury that in thirty-eight states a right at least equal to that secured by the Sixth Amendment is constitutionally guaranteed; in each of these states a defendant

[25] But see Hoyt v. Florida, 368 U.S. 57 (1961).

in a criminal case subject to a maximum term of imprisonment in excess of six months cannot be convicted without the unanimous verdict of a twelve man jury.[26] See Appendix B which sets forth the scope of the right to trial by jury in each of the states. Ten additional states and most of New York[27] guarantee the right to trial by jury in all cases in which that right is available under the Sixth Amendment, although modifications of the requirements of a twelve man jury or a unanimous verdict are made in some cases, frequently only cases not punishable by more than one year imprisonment. Appendix B. With one narrow exception,[28] Louisiana is the only jurisdiction in the United States where all right to trial by jury is denied in a class of cases in which the right is guaranteed at common law and under the Sixth Amendment. In Louisiana, the right is denied by statute in a number of serious criminal cases, including at least one offense punishable by up to ten years imprisonment.[29]

d. *Trial by Jury Secures the Individual Against Arbitrary Official Conduct*

The right in a criminal proceeding to trial by a jury fairly representative of the community is frequently a defendant's only protection against arbitrary official conduct. In this case, appellant was arrested at the height of official opposition to court-ordered school desegregation in Plaquemines Parish.[30] The prosecution was initiated

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[26] In Patton v. United States, 281 U.S. 276 (1930), the Court stated that the Sixth Amendment guarantees a twelve man jury and a unanimous verdict. 281 U.S. at 288. The cases cited in note 5, *supra*, hold that the jury trial right applies under the Sixth Amendment in all but "petty offenses." See 18 U.S.C. § 1.

[27] The New York practice is set forth in Appendix B, p. 8a.

[28] See note 27, *supra*.

[29] LA. REV. STAT. 14:34.1 (Cum. Supp. 1962). The right to trial by jury in Louisiana is summarized in Appendix C.

[30] See United States v. Plaquemines Parish School Board, 12 Race Rel. L. Rep. 219 (E.D. La. Oct. 21, 26, 1966) (Supplemental Order); United States v. Plaquemines Parish School Board, Civil Action No. 66-71A (E.D. La. June 27, 1967) (Findings of Fact and Conclusion of Law, Second Supplemental Order).

not by the indictment of a grand jury, but by a Bill of Information filed by the District Attorney, Leander Perez, Jr.

At trial, appellant asserted that he had acted to protect the Negro boys from violent interference with their exercise of federal rights and that he had acted entirely peacefully. It is appellant's position that the prosecution against him was part of the general official effort to discourage the exercise of rights under the federal court order. On the other hand, the state contended that appellant had actually slapped one of the boys on the elbow and had thus, at least technically, committed a battery. Once the factual dispute was resolved in the state's favor on the basis of more than "no evidence",[31] in a proceeding that had the objective earmarks of fairness,[32] it is doubtful that other remedies remained available for the vindication of appellant's right. *Cf. City of Greenwood v. Peacock*, 384 U.S. 808, 828-29 (1966).

"The vindication of the defendant's federal rights", and particularly his basic right to an impartial determination of guilt or innocence "is left to the state courts . . . " (*Id.* at 828). Due process of law requires that this determination be made by twelve of the defendant's peers, and not by a "justice . . . named by the Crown . . . who might . . . imprison . . . any man that was obnoxious to the government, by an instant declaration, that such is their will and pleasure." IV BLACKSTONE, *op. cit. supra*, at *349-50.

> . . . [I]n times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the Crown, in suits between the king and the subject, than in disputes between

[31] Thompson v. Louisville, 362 U.S. 199 (1960).
[32] Townsend v. Sain, 372 U.S. 293 (1963).

> one individual and another. . . . [T]he founders of the English law have with excellent forecast contrived . . . that the truth of every accusation . . . should afterwards be confirmed by the unanimous suffage of twelve of [defendant's] equals and neighbours, indifferently chosen and superior to all suspicion.[33]

## *CONCLUSION*

This appeal raises an issue of fundamental importance to our system of criminal justice. The Court has not directly considered the applicability of the Sixth Amendment jury trial guarantee to the states since 1900, at a time when it was thought that none of the guarantees of the Sixth Amendment applied in the state courts. In light of the recent cases in this Court applying to the states all the rights of the Sixth Amendment other than trial by jury, and in light of the historical and contemporary materials demonstrating the significance of trial by jury, the issue should be reconsidered by the Court at this time.

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July, 1967.

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[33] IV BLACKSTONE, *op. cit. supra* *349-50.

## *APPENDIX A*

### MEMORANDUM DECISION OF THE SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

v.

GARY DUNCAN.

No. 48573.

Supreme Court of Louisiana.

Feb. 20, 1967.

In re: Gary Duncan applying for writ of certiorari.

The application is denied. No error of law in the ruling complained of.

## APPENDIX B

### SCOPE OF THE RIGHT TO TRIAL BY JURY OUTSIDE LOUISIANA

The following thirty-eight states guarantee a right to trial by jury equal to or greater than the right secured in federal courts under the Sixth Amendment. In each of these states, a defendant charged with an offense punishable by more than six months imprisonment is entitled to be tried by a twelve man jury, all of whom must concur in the verdict. Compare *Patton v. United States*, 281 U.S. 276 (1930).

*Alabama:* CONSTITUTION, art. 1, § 6, art. 1, § 11; Amendment XXXVII; ALA. CODE tit. 15, § 227; tit. 13, §§ 126, 327; tit. 7, § 264; tit. 13, §§ 424, 429; tit. 30 § 99(1) (1958), *Baader v. State*, 201 Ala. 76, 77 So. 370 (1917).

*Arizona:* CONSTITUTION, art. 2, § 24, art. 2, § 23; ARIZ. REV. STAT. ANN. § 21-102 (1956), § 21-103, § 22-301 (Supp. 1966), § 22-402 (1956); ARIZ. R. CRIM. P. 300.

*Arkansas:* CONSTITUTION, art. 2, § 10, art. 2, § 7; ARK. STAT. ANN. § 43-1901, § 43-2160 (1964).

*California:* CONSTITUTION, art. 1, § 7; *Ex parte Wong Yon Ting*, 106 Cal. 296, 39 Pac. 627 (1895); CAL. PEN. CODE ANN. § 1140 (1956); *People v. Howard*, 211 Cal. 322, 295 Pac. 333 (1930).

*Colorado:* CONSTITUTION, art. 2, § 16, art. 2, § 23; (See COLO. REV. STAT. ANN. § 79-15-4, *repealed*, Laws 1964, p. 436, § 73); COLO. REV. STAT. ANN. § 39-7-20.

*Connecticut:* CONSTITUTION, art. 1, § 8, art. 1, § 19; CONN. GEN. STAT. ANN. § 54-82 (1960), §§ 51-266, 51-273 (Supp. 1966); *State v. Gannon*, 75 Conn. 206, 52 Atl. 727 (1902).

*Delaware:* CONSTITUTION, art. 1, § 7, art. 1, § 4, art. 4, § 28; DEL. CODE ANN. tit. 10 § 4519 (1953); DEL. SUPER. CT. (CRIM.) R. 23(a)(b), 31 (1953); DEL. CODE ANN. tit. 11, § 2701 (Supp. 1966).

*Georgia:* CONSTITUTION, § 2-105, § 2-5101; GA. CODE ANN. § 59-707 (1965); *Sullivan v. State*, 29 Ga. App. 377, 115 S.E. 2d 290 (1923).

*Hawaii:* CONSTITUTION, art. 1, § 11; HAWAII REV. LAWS, § 231-9 (1955).

*Idaho:* CONSTITUTION, art. 1, § 7; *State v. Jutilla*, 34 Id. 595, 202 Pac. 566 (1921); IDAHO CODE ANN. § 18-113; *State v. Scheminisky*, 31 Id. 504, 508, 174 Pac. 611 (1918).

*Illinois:* CONSTITUTION, art. 2, § 9, art. 2, § 5; ILL. ANN. STAT. ch. 78, §§ 20, 23 (Smith-Hurd 1966); *People v. Lobb*, 17 Ill. 2d. 287, 161 N.E. 2d 325 (1959).

*Indiana:* CONSTITUTION, art. 1, § 13; IND. ANN. STAT. § 9-1501, § 9-1811 (1956).

*Kansas:* CONSTITUTION, Bill of Rights § 10, Bill of Rights § 5; KAN. GEN. STAT. ANN. § 62-1412, § 62-1501 (1964).

*Maine:* CONSTITUTION, art. 1, § 6; ME. R. CRIM. P. 23(b), 31(a).

*Maryland:* CONSTITUTION, Declaration of Rights, art. 21, art. 5; Md. Rules P. 743, 758.

*Massachusetts:* CONSTITUTION, Pt. 1, art. XII, § 13; *Jones v. Robbins*, 74 Mass. 329, 341, 343-45, 347 (1857); MASS. GEN. LAWS ANN. ch. 234, § 26B (Supp. 1966); ch. 234 § 33 (1959); *Commonwealth v. Bellino*, 320 Mass. 635, 71 N.E. 2d 411 (1947).

*Michigan:* CONSTITUTION, art. 1, § 20, art. 1, § 14; MICH. STAT. ANN. § 27.3936(13), § 28.1192 (1954).

*Minnesota:* CONSTITUTION, art. 1, § 6, art. 1, § 4; MINN. STAT. § 593.01 (1947).

*Mississippi:* CONSTITUTION, art. 3, § 26, art. 3 § 31; MISS. CODE ANN. § 1615; (Supp. 1966) §§ 1836, 1202 (1957).

*Missouri:* CONSTITUTION, art. 1, § 18(a), art. 1, § 22(a); MO. REV. STAT. § 546.390, § 543.250 (1959).

*Montana:* CONSTITUTION, art. 3, § 16, art. 3, § 23; MONT. REV. CODES ANN. § 94-116 (1964).

*Nebraska:* CONSTITUTION, art. 3, § 11, art. 3, § 6; NEB. REV. STAT. §§ 18-205, 18-201 (1962); § 29-2022 (1965).

*Nevada:* CONSTITUTION, art. 1, § 3; *State v. McClear*, 11 Nev. 39 (1876); NEV. REV. STAT. § 175.480 (1963).

*New Hampshire:* CONSTITUTION, pt. 1, art. 15; *State v. Ray*, 63 N.H. 406 (1885). *Opinion of the Justices*, 41 N.H. 550 (1860).

*New Jersey:* CONSTITUTION, art. 1, § 10, art. 1, § 9; N.J. STAT. ANN. § 2A:74-1 (1952). *State v. Gibson*, 15 N.J. 384, 105 A. 2d 1 (1959).

*New Mexico:* CONSTITUTION, art. 2, § 14, art. 2, § 12; N.M. STAT. ANN § 36-12-3, § 36-2-5 (1964).

*North Carolina:* CONSTITUTION, art. 1, § 13, art. 1, § 19, art. IV, § 27; N.C. GEN. STAT. § 15-177, § 15-177.1, § 7-204, § 7-393 (1953). *State v. Berry*, 190 N.C. 363, 130 S.E. 12 (1925).

*North Dakota:* CONSTITUTION, art. 1, § 7; N.D. CENT. CODE § 40-18-17 (Supp. 1965), § 33-12-19, § 29-22-14 (1960).

*Ohio:* CONSTITUTION, art. 1, § 10, art. 1, § 5; OHIO REV. CODE ANN. § 2938.06, § 2945.77 (1964 Baldwin).

*Pennsylvania:* CONSTITUTION, art. 1, § 9, art. 1, § 6; *Commonwealth v. Widmeyer*, 149 Pa. Super.

91, 26 A. 2d 125 (1942); PA. STAT. ANN. tit. 17, § 1142; *Commonwealth v. Fugmann*, 330 Pa. 4, 28, 198 Atl. 99 (1938).

*Rhode Island:* CONSTITUTION, art. 1, § 10, art. 1, § 15; R.I. GEN. LAWS ANN. § 9-10-12 (1956).

*South Dakota:* CONSTITUTION, art. 6, § 7, art. 6, § 6; S.D. CODE § 34.3673 (Supp. 1960).

*Tennessee:* CONSTITUTION, art. 1, § 9, art. 1, § 6; TENN. CODE ANN. § 40-2504 (Supp. 1966); *Memphis v. Trigally*, 46 Tenn. 382 (1869); *Woods v. State*, 99 Tenn. 182, 41 S.W. 811 (1897).

*Vermont:* CONSTITUTION, ch. 1, art. 10, ch. 1, art. 12; VT. STAT. ANN. tit. 12, § 1505 (1958).

*Washington:* CONSTITUTION, art. 1, § 22, art. 1, § 21; WASH. REV. CODE ANN. § 2-36-050; § 3-20-040; § 35-20-090; § 35-20-030; § 10-61-040 (1965).

*West Virginia:* CONSTITUTION, art. 3, § 14; W. VA. CODE ANN. § 5175[50-18-7] (1961).

*Wisconsin:* CONSTITUTION, art. 1, § 7, art. 1, § 5; WIS. STAT. ANN. § 957-01, § 62.24, (Supp. 1967); § 959.01 (1958); *Rothbauer v. State*, 22 Wis. 468 (1868).

*Wyoming:* CONSTITUTION, art. 1, § 10, art. 1, § 9, art. 5, § 22; WYO. STAT. ANN. § 7-427, § 7-409, § 5-130, § 5-123 (1957).

The following five states guarantee a right to trial by jury in all cases in which a jury would be available in federal courts under the Sixth Amendment. A jury of less than twelve men is provided, however, in cases in which the maximum sentence may not exceed one year imprisonment.

*Alaska:* CONSTITUTION, art. 1, § 11; ALASKA STAT. § 22.15.150, § 22.15.060, § 11.75.030 (1962) (six jurors in District Magistrate Court).

*Iowa:* CONSTITUTION, art. 1, § 10, art. 1, § 9; IOWA CODE §§ 602.39, 602.15, 687.7 (1966) (six jurors in Municipal Court).

*Kentucky:* CONSTITUTION, §§ 7, 11, 248; KY. REV. STAT. § 25.010, § 26.010 (Supp. 1966), KY. R. CRIM. P. 9.82 (six jurors in inferior courts).

*Oklahoma:* CONSTITUTION, art. 2, § 20, art. 2, § 19; OKLA. STAT. tit. 20, § 272, tit. 21, § 10 (1951) (six jurors in County Court). (The verdict in these misdemeanor cases may be rendered by three-fourths of the whole number of jurors).

*Virginia:* CONSTITUTION, art. 1, § 8, art. 1, § 11; VA. CODE § 19.1-206, § 18.1-9 (1960) (five jurors in misdemeanor cases).

*Texas* guarantees a right to trial by jury in all cases in which a jury would be available in federal courts under the Sixth Amendment. A jury of six men is provided, however, in the county court in cases in which the punishment may not exceed two years. In the district court, in misdemeanor cases, nine members of the jury may render a verdict. CONSTITUTION, art. 1, § 10, art. 1, § 15, art. 5, § 17; TEX. CODE CRIM. P. ANN. art. 4.07 (1966); TEX. PEN. CODE ANN. art. 1148 (1961); TEX. CODE CRIM. P. ANN. art. 37.02 (1966).

The following two states guarantee a right to trial by jury for all offenses in which a jury would be available in federal courts under the Sixth Amendment. A jury of less than twelve men is provided, however, for all but capital cases.

*Florida:* CONSTITUTION, Declaration of Rights §§ 11, 3, art. 5, § 22; FLA. STAT. § 913.10, § 919.10 (1965) (six jurors in all cases not capital).

*Utah:* CONSTITUTION, art. 1, § 12, art. 1, § 10; UTAH CODE ANN. § 78-46-5 (1953) (eight in courts

of general jurisdiction, four in courts of inferior jurisdiction).

*Oregon* guarantees a right to trial by jury for all offenses in which a jury would be available in federal courts under the Sixth Amendment. Ten members of the jury are permitted to render a verdict, however, in all cases except first degree murder. CONSTITUTION, art. 1, § 11; ORE. REV. STAT. 136.610 (1957).

*South Carolina* guarantees a right to trial by jury for all offenses in which a jury would be available in federal courts under the Sixth Amendment. However, in all but a group of the most serious crimes, a six man jury is provided. CONSTITUTION, art. 1, § 18, art. 1, § 25, art. 5, § 22; S.C. CODE § 15-618, § 15-612 (1962).

*New York* guarantees a right to trial by jury for all offenses in which a jury trial would be available under the Sixth Amendment in all areas outside of New York City. However, outside New York City a six man jury is provided for offenses where the maximum potential sentence does not exceed one year imprisonment. In New York City jury trials are denied where the maximum potential sentence does not exceed one year. CONSTITUTION, art. 1, § 2, art. 6, § 18; PENAL LAW § 1937 (1944); CODE CRIM. P. §§ 702, 710 (1958); N.Y.C. CRIM. CT. ACT. § 40 (1966); N.Y.C. CRIM. CT. ACT. § 31 (1963); *People v. Sanabria*, 42 Misc. 2d 464, 249 N.Y.S. 2d 66, 71 (App. Div. 1964).

## *APPENDIX C*

### SCOPE OF RIGHT TO TRIAL BY JURY IN LOUISIANA

The following constitutional and statutory provisions govern the rule to trial by jury in Louisiana:

LOUISIANA CONSTITUTION, art. 7, § 41:

> ... All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.

LA. CODE CRIM. PROC. art. 779 (1967):

> A defendant charged with a misdemeanor shall be tried by the court without a jury.

LA. REV. STAT. ANN. 14:2 (Supp. 1966):

> ... (4) 'Felony' is any crime for which an offender may be sentenced to death or imprisonment at hard labor.
>
> * * *
>
> (6) 'Misdemeanor' is any crime other than a felony.

LA. CODE CRIM. PROC. art. 782 (1967):

> Cases in which the punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. Cases in which the punishment is necessarily at hard labor shall

> be trial by a jury composed of twelve jurors, nine of whom must concur to render a verdict. Cases in which the punishment may be imprisonment at hard labor, shall be tried by a jury composed of five jurors, all of whom must concur to render a verdict.

Among the offenses which are not punishable at hard labor and therefore categorized as misdemeanors for which there is no trial by jury are:

> Aggravated battery resulting from breach of the peace. LA. REV. STAT. 14:34.1 (Cum. Supp. 1962) (ten years maximum imprisonment).
>
> Indecent behavior with juveniles. LA. REV. STAT. 14:81 (Cum. Supp. 1962) (two years maximum imprisonment).
>
> Contributing to the delinquency of a juvenile. LA. REV. STAT. ANN. 14:92 (Supp. 1966) (two years maximum imprisonment).
>
> Aggravated assault. LA. REV. STAT. 14:37 (1950) (two years maximum imprisonment).

Among the offenses for which imprisonment *may* be at hard labor and are therefore triable by a jury of five are:

> Aggravated criminal damage to property. LA. REV. STAT. 14:55 (1950) (fifteen years maximum imprisonment).
>
> Aggravated battery. LA. REV. STAT. 14:34 (1950) (ten years maximum imprisonment).
>
> Forgery. LA. REV. STAT. 14:72 (1950) (ten years maximum imprisonment).

The only charges in Louisiana on which an accused is entitled to a twelve man jury whose verdict must be unanimous are murder LA. REV. STAT. 14:30 (1950), aggravated rape LA. REV. STAT. 14:42 (1950), and aggravated kidnapping LA. REV. STAT. 14:44 (1950).

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 410

GARY DUNCAN, *Appellant,*

v.

STATE OF LOUISIANA, *Appellee.*

***On Appeal from the Supreme Court of Louisiana.***

## *BRIEF FOR APPELLANT*

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November, 1967

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

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No. 410

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GARY DUNCAN,

*Appellant,*

v.

STATE OF LOUISIANA,

*Appellee.*

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***On Appeal from the Supreme Court of Louisiana.***

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## *BRIEF FOR APPELLANT.*

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### I. *OPINION BELOW*

The Memorandum Decision of the Supreme Court of Louisiana is reported at 250 La. 253, 195 So. 2d 142 and appears in the printed appendix at page 14. No other written opinions have been delivered.

### II. *STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED*

This is a criminal prosecution against the appellant, Gary Duncan. Appellant was charged and convicted in the Twenty-Fifth Judicial District Court of Louisiana (Plaquemines Parish) of simple battery in violation of

Louisiana Revised Statutes, Section 14:35. (App. 1-3)[1] Simple battery is defined as a battery committed without a dangerous weapon and is punishable by two years imprisonment. Article 779 of the Code of Criminal Procedure of Louisiana denies a jury trial on that charge. Appellant contended that Article 779 is invalid, because it is repugnant to the Sixth and Fourteenth Amendments to the Constitution of the United States. (App. 9-13) The decision of the Supreme Court of Louisiana was in favor of the validity of Article 779. (App. 14) Jurisdiction of this appeal is conferred on this Court by Title 28 of the United States Code, Section 1257 (2).

The decision of the Supreme Court of Louisiana denying appellant's application for a writ of certiorari was rendered on February 20, 1967. (App. 14) The Notice of Appeal was filed in the Twenty-Fifth Judicial District Court of Louisiana, the Court possessed of the record, on May 15, 1967. (App. 15-16) On July 6, 1967, Honorable Joe W. Sanders, Associate Justice of the Supreme Court of Louisiana, extended appellant's time to docket the appeal in this Court to July 24, 1967. (App. 17) The appeal was docketed on July 24, 1967 and probable jurisdiction was noted by the Court on October 9, 1967.

## III. *CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED*

This appeal involves Section I of the Fourteenth Amendment of the United States Constitution; Article 779 of the Louisiana Code of Criminal Procedure; Article 7 Section 41 of the Louisiana Constitution; and Louisiana Revised Statutes 14:2 and 14:35. These provisions are reprinted in Appendix A, *infra.*

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[1] "App. " references are to the separate appendix filed pursuant to Rule 36. The appendices in this Brief will be cited as "Appendix A," etc.

## IV. *QUESTION PRESENTED*

Does a state statute that denies the right to trial by jury in a prosecution for battery, where a two year prison term may be imposed, violate the Sixth and Fourteenth Amendments to the United States Constitution?

## V. *STATEMENT OF THE FACTS OF THE CASE*

Gary Duncan, appellant herein, is a Negro citizen of the United States, and a resident of Plaquemines Parish, Louisiana. On December 5, 1966, appellant was charged with simple battery in a bill of information filed in the Twenty-Fifth Judicial District Court of Louisiana. (App. 1) In Louisiana, simple battery is a crime punishable by a term of two years imprisonment and a fine of $300. LA. REV. STAT. 14:35 (1950). Because simple battery is not punishable by "imprisonment at hard labor," the crime is categorized as a "misdemeanor" at state law. LA. REV. STAT. 14:2 (1950). Article 779 of the Code of Criminal Procedure of Louisiana in express terms denies the right to trial by jury in misdemeanor cases.

On January 25, 1967, prior to trial in the state court, appellant filed a "Demand for Trial by Jury," in which he contended that the right to trial by jury on the charge against him was secured by the Sixth and Fourteenth Amendments to the United States Constitution. (App. 4) The demand was rejected by the trial judge on the authority of Article 779 of the Louisiana Code of Criminal Procedure. (App. 5-6; 18-19) Appellant was then tried before a judge, without a jury.

The charge against appellant was based on an incident involving his two young cousins, who had recently transferred to the formerly all-white Boothville-Venice School

under the provisions of a federal court order.[2] After the transfer, these boys were assaulted, threatened, and otherwise harassed by the white students in the school. (App. 22, 24, 32, 52) On October 18, 1966, appellant was driving home past the Boothville-Venice School and observed his two cousins confronted by four white boys on the highway. (App. 28) He stopped his car, told the Negro boys to get into his car and drove them away. (App. 31, 59, 64) At the trial, the white boys and a white onlooker some distance away testified that after the Negro boys went to appellant's car, appellant slapped one of the white boys on the arm. (App. 21, 31, 44, 49) Appellant and his two cousins each testified that appellant had not slapped the boy, but had merely touched him on the elbow, as a manner of expression, while telling him that it would be best if he went home. (App. 53-54, 60, 64)

The trial judge resolved the factual dispute against the appellant and found him guilty as charged. (App. 3) On February 1, 1967, appellant perfected a formal bill of exception on the jury trial issue, in accordance with state procedure. (App. 5-6) He was then sentenced to sixty days in prison and a $150 fine, with the proviso that if the fine and costs are not paid, an additional twenty day sentence shall be served. (App. 3)

On February 6, 1967, appellant filed in the Supreme Court of Louisiana an application for a writ of certiorari to review the judgment below, and specifically the ruling of the court on appellant's demand for trial by jury. (App. 9-13) In the application, appellant expressly argued that Article 779 of the Louisiana Code of Criminal Procedure is "unconstitutional on its face", under the Sixth and Fourteenth Amendments to the United States Constitution, "in-

[2] United States v. Plaquemines Parish School Board, 11 Race Rel. L. Rep. 1764 (E. D. La., Aug. 26, 1966).

sofar as it denied [appellant] the right to trial by jury in this case." (App. 12-13) On February 20, 1967, the Supreme Court of Louisiana denied appellant's application for a writ of certiorari. The Memorandum Decision stated: "No error of law in the ruling complained of." 250 La. 253, 195 So. 2d 142 (1967); (App. 14). The Supreme Court of Louisiana is the highest court in the State of Louisiana. Appellant is free on bond set by the trial court pending disposition of the matter in this Court.

## VI. *SUMMARY OF ARGUMENT*

In *Maxwell v. Dow*, 176 U.S. 581, decided in 1900, this Court held that the Fourteenth Amendment does not secure the right to trial by jury in state criminal proceedings. The Court has not since considered the question. The reasoning that led to the decision of the Court in *Maxwell*—namely that the Fourteenth Amendment does not make applicable to the states any of the specific guarantees of the Bill of Rights—is completely at odds with the recent decisions of the Court interpreting the due process clause to apply most of the Bill of Rights guarantees to the states. In these decisions, the Court has held that a specific provision of the Bill of Rights—and particularly of the Sixth Amendment—is applicable to state criminal proceedings if it is a "fundamental" protection in our legal system. Under this standard, application of the Sixth Amendment jury trial guarantee is plainly required.

Trial by jury was one of the most valued rights in the English common law and was jealously guarded by the American colonists. It is the only procedural right included in the body of the Constitution and reiterated in the Bill of Rights. This Court has always emphasized the great importance of the right to trial by jury in criminal cases. Its decisions on jury selection and jury impartiality demon-

strate the Court's concern for the integrity of the criminal jury. The overwhelming majority of the states guarantee a jury trial right in criminal cases as broad as that secured in federal courts by the Sixth Amendment. This state practice attests to the importance of the criminal jury in our legal system, and, in addition, establishes that availability of the right to jury trial in criminal cases (as distinct from petty offenses) does not impose an undue burden on the administration of the criminal law.

Trial by jury secures due process of law in a criminal trial. The criminal jury serves as an indispensable protection against arbitrary or oppressive prosecutions by the government and additionally introduces a human element into the administration of the criminal laws, by permitting the "voice of the community" to temper the application of strict legal principles. The American system of criminal procedure was designed with a jury in mind, and in that system the divorcement of functions between the judge and the jury is necessary to ensure trial fairness.

## VII. *ARGUMENT*

### *The Fourteenth Amendment Requires That An Accused Be Afforded The Right To Trial By Jury In State Criminal Proceedings*

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury. . . ." The Court has interpreted this guarantee to be applicable to the trial of all "crimes", but not to the trial of "petty offenses". *Cheff v. Schnackenberg*, 384 U.S. 373 (1966); *District of Columbia v. Clawans*, 300 U.S. 617, 624 (1937); *District of Columbia v. Colts*, 282 U.S. 63

(1930); *Callan v. Wilson*, 127 U.S. 540, 557 (1888). It is perfectly clear that battery, punishable by two years imprisonment is a "crime" as defined by the decisions of this Court, and that, if the case had been tried in a federal court, appellant unquestionably would have been entitled to trial by jury under the Sixth Amendment.[3] Thus, this appeal squarely raises the question of whether there is a comparable Fourteenth Amendment right to trial by jury in state criminal proceedings.

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[3] Simple battery, as defined by Louisiana Revised Statutes 14:35, is a crime, triable by jury under the Sixth Amendment standard, regardless of whether the test is an offense having a potential maximum term of imprisonment of more than six months (18 U.S.C. Sec. 1; Cheff v. Schnackenberg, *supra*, 384 U.S. at 379-80), an offense indictable at common law, (District of Columbia v. Colts, *supra*, 282 U.S. at 73; Callan v. Wilson, *supra*, 127 U.S. at 554-57), or an offense that is *malum in se* (District of Columbia v. Colts, *supra*, 282 U.S. at 73; Cheff v. Schnackenberg, *supra*, 384 U.S. at 387-90 (dissenting opinion of Mr. Justice Douglas); Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 980 (1926)). It is apparent that battery under LA. REV. STAT. 14:35 meets the "potential maximum penalty" and "*malum in se*" tests. Moreover, battery was an indictable offense at common law. III BLACKSTONE, COMMENTARIES* 121; IV Id. at *6, 216-17, I CHITTY, CRIMINAL LAW 138-49 (1819); I RUSSELL, CRIMES AND MISDEMEANORS *60 (1819); II HAWKINS, PLEAS OF THE CROWN 17 (7th ed. 1795).

Although Louisiana categorizes simple battery as a "misdemeanor," this court has held the legislative classification of common law offenses as "misdemeanors" or "felonies" to be irrelevant for purposes of interpreting the Sixth Amendment jury trial guarantee. Callan v. Wilson, 127 U.S. 540, 549 (1888). Compare Harvey v. Mississippi, 340 F. 2d 263, 271 (5th Cir. 1965); McDonald v. Moore, 353 F. 2d 106, 109-10 (5th Cir. 1965). In any event, the crime defined by LA. REV. STAT. 14:35 is a felony under federal standards. 18 U.S.C. Sec. 1. In jurisdictions applying the common law or Sixth Amendment standard, a defendant charged with battery had been consistently guaranteed the right to trial by jury. *In re* Robinson, 20 D.C. 570, 571 (Sup. Ct. D.C. 1892); State v. Stewart, 89 N. Car. 563, 564 (1883); Work v. State, 2 Ohio St. 296 (Sup. Ct. 1853).

The common law "petty offenses" were of a nuisance nature and did not involve serious immorality. Classic instances were disorderliness, drunkenness, vagrancy and violations of health, safety, trade, fish and game regulations. See IV BLACKSTONE, *supra* at 279, 281; 3 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 264-65; FRANKFURTER AND CORCORAN, *supra*, 39 HARV. L. REV. at 983-1019. In every case in which this Court has held an offense to be triable without a jury in a federal court, it has emphasized the lack of serious immorality associated with the offense. *E.g.*, District of Columbia v. Clawans, 300 U.S. 617, 625 (1937) (selling unused railway tickets without a license; "its moral quality is relatively inoffensive") Schick v. United States, 195 U. S. 65 (1904) (sale of unstamped oleomargarine; an offense "not necessarily involving any moral delinquency").

### A. *The Court's Earlier Refusal to Require Trial by Jury in State Criminal Proceedings was Based on an Interpretation of the Fourteenth Amendment That Has Long Been Abandoned*

Sixty-seven years ago, in *Maxwell v. Dow*, 176 U.S. 581 (1900), the Court held that the Fourteenth Amendment does not make the jury trial guarantee of the Sixth Amendment applicable to state proceedings. Specifically, *Maxwell* sustained the use of an eight man jury in a state criminal trial, although two years earlier, in *Thompson v. Utah*, 170 U.S. 343 (1898), the Court held that the Sixth Amendment requires a jury of twelve in federal criminal trials.[4] The result reached in *Maxwell* was based on the then prevailing view that the Fourteenth Amendment does not make any of the specific guarantees of the Sixth Amendment—or, indeed, of the Bill of Rights—applicable to the states, and that the mandate of due process of law is satisfied whenever a defendant is tried according to uniform procedures established by state law. 176 U.S. at 602-05. *Accord, West v. Louisiana*, 194 U.S. 258, 264 (1904).

The question of whether there is a federal constitutional right to trial by jury in state criminal proceedings has not been decided by the Court since *Maxwell*, although in several cases involving other issues there have been statements that such a right is not secured by the Fourteenth Amendment. See, *e.g.*, *Fay v. New York*, 332 U.S. 261, 288 (1947); *Palko v. Connecticut*, 302 U.S. 319, 324 (1937); *Synder v. Massachusetts*, 291 U.S. 97, 105 (1934). The question has thus never been decided by the Court in the context of a complete denial of trial by jury. *Cf. Maxwell v. Dow, supra*, 176 U.S. at 612 (Mr. Justice Harlan dissenting).

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[4] Thompson v. Utah arose at a time when Utah was a territory, and the Sixth Amendment applied directly to criminal proceedings within that jurisdiction. 170 U.S. at 347-49.

More recent decisions of the Court have completely undermined the rationale of *Maxwell* and *West*. Apart from the right to trial by jury, the Court has held every guarantee of the Sixth Amendment applicable to state criminal proceedings. See *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (speedy trial); *In re Oliver*, 333 U.S. 257 (1948) (public trial and notice of the accusation); *Pointer v. Texas*, 380 U.S. 400 (1965) (confrontation); *Washington v. Texas*, 388 U.S. 14 (1967) (compulsory process); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel). These decisions are part of a broader trend toward the application to state criminal trials of rights secured by the Bill of Rights. See *Ker v. California*, 374 U.S. 230 (1963) (Fourth Amendment standard of legality of searches without a warrant); *Aguilar v. Texas*, 378 U.S. 108 (1964) (Fourth Amendment standard for the issuance of a search warrant); *Mapp v. Ohio*, 367 U.S. 643 (1961) (Fourth Amendment exclusion of illegally seized evidence); *Malloy v. Hogan*, 378 U.S. 1 (1964) (Fifth Amendment protection against self-incrimination); *Robinson v. California*, 370 U.S. 660 (1962) (Eighth Amendment protection against cruel and unusual punishment).

The language of the more recent decisions strongly suggests the Court considers all Sixth Amendment rights applicable in state proceedings.

> At one time, it was thought that the Sixth Amendment had no application to state criminal proceedings [citing *West v. Louisiana*, 194 U.S. 258, 264 (1904)]. That view no longer prevails, and in recent years we have increasingly looked to the specific guarantees of the Sixth Amendment to determine whether a state criminal trial was conducted with due process of law.

*Washington v. Texas, supra*, 388 U.S. at 18 (Chief Justice Warren for the Court).

> In light of *Gideon*, *Malloy*, and other cases cited in those opinions holding various provisions of the Bill of Rights applicable to the states by virtue of the Fourteenth Amendment, the statements made in *West* and similar cases generally declaring that the Sixth Amendment does not apply to the States can no longer be regarded as the law.

*Pointer v. Texas*, *supra*, 380 U.S. at 406 (Mr. Justice Black for the Court).

The decision to apply a particular guarantee of the Bill of Rights to state criminal proceedings has depended on the Court's determination as to whether the right is "so fundamental and essential to a fair trial that it is incorporated in the Due Process Clause of the Fourteenth Amendment." *Washington v. Texas*, 388 U.S. at 17-18. See *Pointer v. Texas*, *supra*; *Gideon v. Wainwright*, *supra*; Brennan, *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761 772 (1961). In *Pointer v. Texas*, *supra*, the Court stated "[t]hat the fact that [a] right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that [it is] a fundamental right essential to a fair trial in a criminal prosecution." 380 U.S. at 404. Of course, if this *dictum* provides the test, application of the jury trial guarantee necessarily follows.

Indeed, it may be that the Court has already applied this guarantee to state criminal proceedings. In *Parker v. Gladden*, 385 U.S. 363 (1966), the Court held that "the command of the Sixth Amendment . . . that 'the accused shall enjoy the right to a . . . trial by an impartial jury . . .' [is] made applicable to the states through the Due Process Clause of the Fourteenth Amendment." 385 U.S. at 364. See *Irwin v. Dowd*, 366 U.S. 717, 721-22

(1961). Although the facts in *Parker* concerned the impartiality of the jury, it is doubtful that the Court intended to dissect, for purposes of incorporation, what appears as a unitary guarantee in the Sixth Amendment. If the Court's concern had been for impartiality alone, as an aspect of trial fairness, it would have been enough to base the decision on the unassisted Due Process clause.[5]

But, apart from the question of whether the issue now presented is substantially determined in favor of the jury right by *Parker v. Gladden* and the other cases applying Sixth Amendment guarantees to state criminal proceedings, it is, at the very least, fair to say that the Court's holding in *Maxwell v. Dow*, and its *dicta* in such cases as *Snyder* and *Palko* are no longer controlling.[6] Under the conception of Fourteenth Amendment Due Process recently affirmed in *Gideon*, *Pointer* and *Washington v. Texas*, all *supra*, appellant submits that application of the Sixth Amendment jury trial guarantee to state criminal proceedings is required: (1) by historical and contemporary recognition of the fundamental nature of the jury trial right in

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[5] The United States Court of Appeals for the Second Circuit in United States *ex rel.* De Lucia v. McMann, 373 F. 2d 759, 762 (1967) and Judge Van Voorhis, dissenting from the decision of the New York Court of Appeals in People v. De Lucia, 20 N. Y. 2d 275, 282 N. Y. Supp. 526, 531 (1967) interpreted *Parker* v. *Gladden* as holding the Sixth Amendment jury trial guarantee applicable to state criminal proceedings.

[6] The applicability of the Sixth Amendment jury trial guarantee to the states has been recognized in the lower federal courts as an important, but unsettled question. In Randel v. Beto, 354 F. 2d 497 (1965), the United States Court of Appeals for the Fifth Circuit held that a habeas corpus petitioner's claim based on application of the Sixth Amendment jury trial guarantee to state proceedings was an "important question. . . of constitutional law," entitling petitioner to a hearing. 354 F. 2d at 500. In United States *ex rel.* Gerchman v. Maroney, 355 F. 2d 302 (3d Cir. 1966), Judge Freedman suggested that past statements in this Court concerning the applicability of the jury trial guarantee to the states "are not . . . flatly decisive of the question," in light of the recent decisions holding other guarantees of the Bill of Rights applicable to state proceedings. 355 F. 2d at 313. Judge Freedman refrained from passing on the issue, because the case was disposed of on other grounds, and because he thought it "not unlikely that we may soon have an authoritative expression on the subject from the Supreme Court". 355 F. 2d at 315. The other members of the panel thought the question foreclosed by decisions of this Court. 355 F. 2d at 315-16.

our system of criminal law; and (2) by the essential role which the jury serves in assuring a defendant a fair trial in accordance with due process of law.

### B. *Trial by Jury in Criminal Cases Is Recognized As A Fundamental Guarantee in Our System of Law*

#### 1. Trial by Jury was Recognized at Common Law and by the Framers of the Constitution as an Essential Element of a Fair Trial.

Trial by jury in criminal cases was considered to be a basic safeguard of individual liberties centuries before the adoption of the American Constitution. The right is traceable to the earliest Saxon colonies,[7] and constituted one of the fundamental articles of the Magna Charta: "No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties . . . but by the lawful judgment of his peers . . ." Magna Charta, ch. 39, translated and quoted in COKE, THE SECOND PART OF THE INSTITUTE OF THE LAWS OF ENGLAND 45 (Brooke's 5th ed. 1797). Soon after the thirteenth century trial by jury had become the principal institution for trial of criminal cases. JENKS, A SHORT HISTORY OF ENGLISH LAW 52 (5th ed. 1938).[8] Blackstone described the right to trial by jury in criminal cases as "the most transcendent privilege which any subject can enjoy, or wish for. . . . [T]he liberties of England cannot but subsist, so long as the *palladium* . . . [of trial by jury] remains sacred and inviolate." III BLACKSTONE, *op. cit. supra*, at *379. Compare 1 COKE, LITTLETON* 155b.

The guarantee of trial by jury in criminal cases was further secured in England by its express inclusion in the

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[7] III BLACKSTONE, *op. cit. supra* at *349; SOURCES OF OUR LIBERTIES, 7-9 (Perry, ed. 1959).

[8] See Singer v. United States, 380 U.S. 24, 27 (1965).

English Bill of Rights of 1689.[9] This document served as one of the basic sources for the Bill of Rights to the United States Constitution. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776-1791, p. 19 (1955).

The right to trial by jury in criminal cases was fundamental to the American colonists. Indeed, Parliamentary infringement of this right in the colonies was one of the major grievances of the colonists against British rule. The Declaration of Rights issued in 1765 by the Stamp Act Congress, consisting of delegates from nine of the thirteen original colonies, stated:

> "Trial by jury is the inherent and invaluable right of every British subject of these colonies."[10]

The framers of the Declaration of Independence listed the denial "in many cases, of the benefit of Trial by Jury" as an example of the "repeated injuries and usurpations" of the King of England "all having in direct object the establishment of an absolute tyranny over these States." See also John Adams, *Instructions of the Town of Braintree, Massachusetts on the Stamp Act* (October 14, 1765); Resolution No. 5, Declaration and Resolves of the First Continental Congress (October 14, 1774).

Between the War of Independence and the formation of the American Union, constitutions were adopted by eleven of the former crown colonies. Without exception, these documents guaranteed trial by jury in criminal cases, after the pattern of English law.[11] Trial by jury in

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[9] I Will. III and Mary II, sess. 2, c. 2 (1689), para. 11.

[10] SOURCES OF OUR LIBERTIES 270 (Perry, ed. 1959).

[11] See THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS, V, 2594-98 (1909) (New Jersey Constitution of 1776); *Ibid.*, V, 2623-38 (New York Constitution of 1777); *Ibid.*, VI, 3248-57 (Constitution of South Carolina of 1778); *Ibid.*, II, 777-85 (Constitution of Georgia of 1777); *Ibid.*, VII, 3812-14 (Consti-

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criminal cases is one of the very few individual rights that the framers included in the body of the United States Constitution. Article III, Section 2. See THE FEDERALIST No. 83 (Hamilton). It is the only such provision that is reiterated in the Bill of Rights. See *Toth v. Quarles*, 350 U.S. 11, 16 (1955).[12]

In his treatise on the Constitution published in 1833, Mr. Justice Story reflected the contemporary view of the "antiquity" and "importance of trial by jury in criminal cases."

> It was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties, and watched with an unceasing jealousy and solicitude. The right constitutes one of the fundamental articles of the Magna Charta. . . . When our more immediate ancestors removed to America, they brought this great privilege with them, as their birthright and inheritance, as a part of that admirable common law, which had fenced round and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our state constitutions as a fundamental right, and the constitution of the United States would have been justly obnoxious to the most conclusive objec-

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[11] Continued

tution of Virginia of 1776, Sec. 8); *Ibid.*, V, 3081-84 (Constitution of Pennsylvania of 1776, Sec. IX); *Ibid.*, III, 1686-91 (Constitution of Maryland of 1776, Sec. XIX); *Ibid.*, V, 2787-89 (Constitution of North Carolina of 1776, Sec. IX); *Ibid.*, III, 1888-93 (Constitution of Massachusetts of 1780, Pt. 1, Sec. 12); *Ibid.*, IV, 2453-57 (Constitution of New Hampshire of 1784, Art. I, Sec. 15); I Laws of the State of Delaware, 1700-1797, App. 1981 (New Castle, 1797) (Delaware Declaration of Rights of 1776, Sec. 14). In addition Vermont, which had not been recognized as a Crown Colony, included the jury trial guarantee in its Constitution of 1777. THORPE, *supra*, VI, 3737-42.

[12] In his opinion in *Reid* v. *Covert*, 354 U.S. 1 (1957) Mr. Justice Black referred to the "common knowledge" that fear of abolition of trial by jury was one of the principal sources of objection to the federal constitution and provided an important reason for the adoption of the Bill of Rights. 354 U.S. at 9, n.12.

> tion, if it had not recognized and confirmed it in the most solemn terms.[13]

The history of the right to trial by jury and its reception in this country clearly establish that it is one of the basic rights preserved by our Constitution.

**2. This Court has Consistently Recognized Trial by Jury in Criminal Cases As A Right of Fundamental Importance.**

Over 100 years ago, in *Ex Parte Milligan*, 71 U.S. 2, 123 (1866), this Court described "the inestimable privilege of trial by jury . . . [as] a vital principle underlying the whole administration of criminal justice." In *Toth v. Quarles*, 350 U.S. 11 (1955), the Court stated that:

> [T]he Constitution and the Amendments in the Bill of Rights show that the Founders were not satisfied with leaving determination of guilt or innocence to judges, . . . [O]ther safeguards designed to protect defendants against oppressive governmental practices were included. One of these was considered so important to liberty of the individual that it appears in two parts of the Constitution. . . . *This right of trial by jury ranks very high in our catalogue of constitutional safeguards.* 250 U.S. at 16 (emphasis supplied).

The decision of the Court in *Reid v. Covert*, 354 U.S. 1 (1957) concerned the applicability of Fifth and Sixth Amendment rights to the trial of civilians attached to military personnel. The plurality opinion accepted the premise set forth by the Government that only those constitutional rights which are "fundamental" protect Americans abroad, but held trial by jury in criminal cases to be among those rights. 354 U.S. at 9.

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[13] 2 STORY, CONSTITUTION OF THE UNITED STATES 527 (2d ed. 1851).

> [I]n view of our heritage and the history of the adoption of the Constitution and the Bill of Rights, it seems peculiarly anomalous to say that trial by a civilian judge and an independent jury picked from the common citizenry are not fundamental rights. 354 U.S. at 9-10.

*Accord, Kinsella v. Singleton*, 361 U.S. 234, 249 (1960). "Fundamentalness" is, of course, the same test that has governed the application of Bill of Rights guarantees to the states.

In *Irwin v. Dowd*, 366 U.S. 717 (1961), the Court recognized the essential role of trial by jury in our legal heritage in the following terms:

> England, from whom the Western world has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, *the most priceless of which is trial by jury.* This right has become as much American as it was once the most English. Although this Court has said that the Fourteenth Amendment does not demand the use of jury trials in a state's criminal procedure, Fay v. New York, 332 U.S. 261; Palko v. Connecticut, 302 U.S. 319, every state has constitutionally provided trial by jury. . . . *In the ultimate analysis, only the jury can strip a man of his liberty or his life.* 366 U.S. at 721-22 (emphasis supplied).

See also *Turner v. Louisiana*, 379 U.S. 466, 471-73 (1965); *Thompson v. Utah, supra*, 170 U.S. at 349-53.[14]

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[14] In his James Madison lecture at the New York University School of Law, Mr. Justice Brennan, referring to the articulated standards of due process of law set forth by the Court in such older cases as Hurtado v. California, 110 U.S. 516, 535 (1884); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), and Palko v. Connecticut, 302 U.S. 319, 325 (1937), asked rhetorically whether "Madison [would] have thought that the right of . . . an accused, to enjoy the right in criminal prosecutions to a speedy and public trial by an impartial jury of twelve, to be confronted

In *Cheff v. Schnackenberg*, 384 U.S. 373 (1966), this Court ruled that even in criminal contempt cases, where there is considerable question about the practice at common law,[15] a sentence in excess of six months, the statutory maximum for "petty offenses"[16] may not be imposed by a federal court without trial by jury. And in *Bloom v. Illinois* (No. 52, this term) the Court will consider whether the rule articulated in *Cheff* is applicable, by virtue of the Fourteenth Amendment, to criminal contempt proceedings in state courts.

The Court has shown its concern for the integrity of trial by jury in a long line of decisions, dating back to *Strauder v. West Virginia*, 100 U.S. 303 (1880), invalidating the systematic exclusion of Negroes from grand and petit juries. *E.g., Norris v. Alabama*, 294 U.S. 587 (1935); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Eubanks v. Louisiana*, 356 U.S. 584 (1958). In recent years, this Court and the lower federal courts have further secured the common law mandate that no man be convicted other than by a "judgment of his peers"[17] by insisting that juries in state and federal courts be selected in a manner that will ensure a representative cross section of the community on venire lists. *E.g., Whitus v. Georgia*, 385 U.S. 545 (1967) (exclusion of Negroes); *Hernandez v. Texas*, 347 U.S. 475 (1954) (exclusion of Mexican-Americans);

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[14] Continued
with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense, were rights unnecessary to 'the very essence of a scheme of ordered liberty,' or that any was not among 'the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions', or not among those personal immunities which are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'?" Brennan, *The Bill of Rights and the States*, 36 N.Y.U. L. Rev. 761, 777 (1961).

[15] Compare Barnett v. United States, 376 U.S. 681, 701-24 (1964) (Appendix to Opinion of the Court), with *Id.* at 740-51 (dissenting opinion of Mr. Justice Goldberg).

[16] 18 U.S.C. Sec. 1.

[17] Magna Charta, ch. 39, *supra*.

*Labat v. Bennett*, 365 F. 2d 698 (5th Cir. 1966) (en banc), *cert. denied*, 386 U.S. 991 (1967) (exclusion of wage earners); *White v. Crooke*, 251 F.Supp. 401 (M. D. Ala. 1966) (three judge court) (exclusion of women).[18] See *Schowgurow v. State*, 240 Md. 121, 213 A. 2d 475 (1965) (exclusion of atheists).[19]

Further, this Court has repeatedly struck down state court convictions, where it appeared that jurors had been exposed to prejudicial newspaper publicity or other influences inimical to the defendant. *Parker v. Gladden*, *supra* (remarks of bailiff); *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966) (newspaper publicity); *Estes v. Texas*, 381 U.S. 532, 545 (1965) (broadcasting of trial); *Irwin v. Dowd*, *supra* (newspaper publicity); *Moore v. Dempsey*, 261 U.S. 86 (1923) (mob domination).

It would be ironic indeed if a state were permitted to nullify this Court's carefully developed protections of the jury system by substituting for trial by jury trial by a single judge, who obviously does not represent a fair cross section of the community and who is frequently exposed to official and unofficial influences prejudicial to the defendant. See Section C(3), *infra*, pp. 28-31.

**3. The Fundamental Importance of Trial by Jury in Criminal Cases Has Been Widely Recognized by the States.**

The practice of the American states with respect to trial by jury in criminal matters is a further measure of

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[18] But see Hoyt v. Florida, 368 U.S. 57 (1961).

[19] The right of a defendant to a jury reflecting a fair cross section of the community has been held to apply where there is no proof of actual prejudice to the defendant, Pierre v. Louisiana, 306 U.S. 354 (1939); Strauder v. West Virginia, *supra*, 100 U.S. at 309, and where the defendant is not a member of the class excluded, Allen v. State, 110 Ga. App. 56, 137 S. E. 2nd 711 (1964); State v. Madison, 240 Md. 265, 213 A. 2d 880 (1965). See Labat v. Bennett, *supra*, 365 F. 2d at 723, n. 43.

the essential nature of this guarantee. See *Ferguson v. Georgia*, 365 U.S. 570 (1961). Every state makes some provision for trial by jury in criminal cases. More significantly, in thirty-eight states a right as broad as that given in federal courts by the Sixth Amendment is guaranteed by law; in each of these states a defendant in a criminal case subject to a maximum term of imprisonment in excess of six months cannot be convicted without the unanimous verdict of a twelve man jury.[20] See Appendix B, *infra*, which sets forth the scope of the right to trial by jury in each of the states other than Louisiana. In ten additional states, and most of New York,[21] a jury trial is provided in every case where the maximum term of imprisonment exceeds six months, but modifications of the requirements of twelve jurors or a unanimous verdict are made in some less serious cases, frequently only cases not punishable by more than a year imprisonment. Appendix B. With one narrow exception,[22] Louisiana is the only jurisdiction in the United States where all right to trial by jury is denied in a class of cases in which the right is

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[20] In Patton v. United States, 281 U.S. 276 (1930), the Court stated that the Sixth Amendment guarantees a twelve man jury and a unanimous verdict. See Thompson v. Utah, 170 U.S. 343 (1898). This Court, relying on 18 U.S.C. Sec. 1, has recently defined the petty offense exception to the Sixth Amendment jury trial right, as limited to offenses punishable by less than six months imprisonment. Cheff v. Schnackenberg, 384 U.S. 373 (1966). But see *Id.* at 387-90 (dissenting opinion of Mr. Justice Douglas); District of Columbia v. Colts, 282 U.S. 63 (1930), suggesting that offenses punishable by less than six months nevertheless may be crimes, and not petty offenses. See note 3, p. 7, *supra*.

[21] The New York practice is set forth in Appendix B, *infra*, p. 8a. A right to trial by jury in all cases where punishment may exceed six months is provided in New York State, outside New York City, although in cases where the punishment may not exceed one year only six jurors are required. No right to trial by jury is provided in New York City in cases in which the potential maximum is less than one year. The proposed revised Constitution for the State of New York, which was rejected by the voters on November 7, 1967, eliminated the special provision for New York City and provided for jury trial throughout the state in all criminal cases where the potential sentence exceeds six months. Article 1, Section 7b; New York Times, November 9, 1967, p. 28, col. 3-4 (Late City Edition).

[22] See note 21, *supra*.

guaranteed at common law and under the Sixth Amendment. In Louisiana, all right to trial by jury—even a jury that does not meet common law requirements—is denied in a number of serious criminal cases, including at least one offense punishable by up to ten years imprisonment.[23] In most other cases, trial by a five man jury, or a twelve man jury, only nine of whom must concur in a verdict, is provided. A jury that conforms to the requirements of the common law and the Sixth Amendment is available in Louisiana only in capital cases. See Appendix C, *infra*, which sets forth the provisions of Louisiana law relating to trial by jury in criminal cases.

The general acceptance by the states of the right to trial by jury in criminal cases not only attests to the importance of this right; it precludes any argument that the result urged by the appellant would impose an intolerable burden on state procedure. The prevailing practice in the overwhelming majority of American states is incontrovertible evidence of the workability of a requirement that trial by jury be provided whenever a defendant may be imprisoned for a period in excess of six months.

In any event, considerations of burden are not an appropriate basis for limiting the application of constitutional rights.

> It is undoubtedly true that a judge can dispose of charges . . . faster and cheaper than a jury. But such trifling economies as may result have not generally been thought sufficient reason for abandoning our great constitutional safeguards aimed at protecting freedom and other basic human rights of incalculable value. Cheap, easy convictions were not the primary concern of those who adopted the Constitution and the Bill of Rights. Every procedural safeguard they established purposely made it

[23] La. Rev. Stat. 14:34.1 (Cum. Supp. 1962).

> more difficult for the government to convict those it accused of crimes. On their scale of values justice occupied at least as high a position as economy."

*Green v. United States*, 356 U.S. 165, 216 (1958) (Mr. Justice Black, dissenting).

Blackstone warned against attacks on the jury trial in the name of convenience. "Let it be remembered, that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution . . ." III BLACKSTONE, COMMENTARIES 379. The right to trial by jury "is not held by sufferance, and cannot be frittered away on any plea of state or political necessity." *Ex Parte Milligan*, 71 U.S. 2, 123 (1866).

### C. *Due Process of Law Requires Trial by Jury in Criminal Cases*

#### 1. Trial by Jury Secures the Individual Against Arbitrary Official Conduct.

The pervasive acceptance of the jury trial in our system of criminal law is largely attributable to the historic role of the jury in protecting accused persons against arbitrary official conduct. Blackstone warned against trial by a "justice . . . named by the Crown . . . who might . . . imprison any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure." IV BLACKSTONE, *op. cit. supra* at 349-50.[24] This

[24] ". . . [I]n times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the Crown, in suits between the king and the subject, than in disputes between one individual and another. . . . [T]he founders of the English law have with excellent forecast contrived . . . that the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of [defendant's] equals and neighbours, indifferently chosen and superior to all suspicion." IV BLACKSTONE, *op. cit. supra* at *349-50.

court has recognized this important role of the petit jury:

> "On many occasions, fully known to the Founders of this Country, jurors—plain people—have manfully stood up in defense of liberty against the importunities of judges and despite prevailing hysteria and prejudices. The acquittal of William Penn is an illustrious example." [25]

*Toth v. Quarles, supra,* 350 U.S. at 18-19. The point was reiterated by Mr. Justice Black in his opinion in *Reid v. Covert, supra:*

> Trial by jury in a court of law and in accordance with traditional modes of procedure . . . has served and remains one of our most vital barriers to governmental arbitrariness." 354 U.S. at 10.[26]

This case is an example of the continued vitality of these principles. Appellant is a Negro resident of Plaquemines Parish, Louisiana. He was arrested at the height of intense opposition by parish officials to court-ordered desegregation of the Plaquemines Parish public schools.[27]

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[25] Penn was tried at Old Bailey in 1670 on charges of violation of the Conventicle Act, which prohibited religious services other than those conducted according to the rites of the Church of England. In the face of clear evidence of Penn's violation of the Act, the jury acquitted. Nager, *The Jury That Tried William Penn,* 50 A.B.A.J. 168 (1964) "After trial the jurors were fined for acquitting Penn contrary to the Court's instructions. One was imprisoned for not paying the fine, but the Court of Common Pleas released him in a habeas corpus proceeding, upholding the freedom of the jury to decide the case. Bushell's Case (Eng.) 6 How. St. Tr. 999." Toth v. Quarles, *supra,* 330 U.S. at 19, n. 13.

[26] Writing in 1833, De Tocqueville observed that:

> . . . All sovereigns who have chosen to govern by their own authority, and to direct society instead of obeying its directions, have destroyed or enfeebled the institution of the jury.

1 DE TOCQUEVILLE, DEMOCRACY IN AMERICA 294 (Bradley, ed. 1945). The action of the Greek military junta, on November 3, 1967, in abolishing the right to trial by jury in criminal cases provides an unfortunately recent reminder of the validity of this analysis. New York Times, November 4, 1967, p. 9, col. 3 (City Edition).

[27] See United States v. Plaquemines Parish School Board, Civil Action No. 66-71A, 12 Race Rel. L. Rep. 219 (E. D. La. Oct. 21, 26, 1966 (Supplemental Order) ); *Id.,* Findings of Fact and Conclusions of Law (June 27, 1967); *Id.,* Application of the United States of America for an Order to Show Cause Why the Defendants Should Not be Held in Civil Contempt, filed September 8, 1967, pending.

The prosecution was initiated not by the indictment of a grand jury, but by a Bill of Information filed by the District Attorney, Leander H. Perez, Jr. (App. 1-2). The substance of the charge was that in attempting to break up a potentially violent confrontation near the Boothville Venice School between four white boys and two Negro boys—both cousins of the appellant, who had recently transferred to the formerly all-white school—appellant slapped one of the white boys on the arm. At trial, appellant and the two Negro boys testified that appellant had not slapped the boy. (App. 53-54, 60, 64). The white boys, and a white onlooker some distance away, testified that he had. (App. 21, 31, 44, 49). The trial judge resolved the factual dispute in favor of the state.

Once the factual dispute was resolved in the state's favor on the basis of more than "no evidence",[28] in a proceeding that had the objective earmarks of fairness,[29] no procedures remained available for the vindication of appellant's asserted innocence. *Cf. City of Greenwood v. Peacock*, 384 U.S. 808, 828-29 (1966).

It is plain that in cases such as this—where the personal and political leanings of the trial judge will often be antagonistic to the defendant—the potential for a factual determination that is influenced by considerations other than the evidence of record is very great. This situation, particularly in civil rights related prosecutions in the Deep South, is not uncommon. Because of the accepted limitation on federal review and state appellate review of factual determinations in state trial courts, the only effective remedy is to guarantee the accused the right to have

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[28] Thompson v. Louisville, 362 U.S. 199 (1960). The Supreme Court of Louisiana, the only appellate court for criminal cases in Louisiana, is constitutionally prohibited from reviewing questions of fact in a criminal case. LA. CONST. Art. 7, Section 10 (1921).

[29] Townsend v. Sain, 372 U.S. 293 (1963).

the crucial factual determination of guilt or innocence made by a jury, rather than by a judge. Trial by twelve jurors representing a cross-section of the community not only dilutes the effect of any individual bias, it tends to make certain that persons not antagonistic to the accused will participate in the fact-finding process.

In our democratic society, trial by jury provides both symbolic expression and indispensable practical protection of the concept that the decision to adjudge a citizen a criminal and to deprive him of his liberty is too important to be committed to professional administrators alone—judges separated by class, by function, by experience and often by considerations of interest and political leaning from the people they judge. *Cf. Toth v. Quarles, supra,* 350 U.S. at 17. Community participation—in the form of trial by jury —has become a vital balance wheel in the administration of American criminal justice, protecting accused persons from judicial arbitrariness or discrimination. This historic role of the petit jury is an essential element of due process in our legal system.

**2. The Criminal Jury Serves to Ameliorate Harsh or Technical Application of Law.**

The criminal jury has performed an important ameliorative function in the Anglo-American legal system. Because an accused may not be convicted, regardless of the strength of the case against him, without the concurrence of the jury, the jury is free to take what Chief Justice Cooley referred to as "the common sense view of a set of circumstances" (*People v. Garbutt,* 17 Mich. 9, 27 (1868)), and reject strict application of legal principles in favor of a result it considers just. In the words of Mr. Justice Holmes, "the jury has the power to bring in a verdict in the teeth of both law and fact." *Horning v. District of*

*Columbia*, 254 U.S. 135, 138 (1920). The essentially democratic role of the jury, "interposing 'the voice of the community' against the possible excessive zeal of prosecutors," *United States v. Maybury*, 274 F. 2d 899, 903 (2d Cir. 1959), has been consistently recognized by this Court and the lower federal courts, *United States v. Dotterweich*, 320 U.S. 277, 279 (1943); *Dunn v. United States*, 284 U.S. 390, 393 (1932); *United States v. Vastine*, 363 F. 2d 853, 854-55 (3d Cir. 1966); *Jackson v. United States*, 313 F. 2d 572, 574-575 (D. C. Cir. 1962); *Cacy v. United States*, 298 F. 2d 227, 228-229 (9th Cir. 1961); *United States v. Margoles*, 294 F. 2d 371, 373 (7th Cir. 1961). See also 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 623-626 (2d ed. 1959); PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 125; 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 317; 1 DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293-94 (Bradley ed., 1945).[30]

In practical operation, the exercise of this ameliorative power by the jury has provided a valuable safeguard for the accused against wooden application of the criminal law. It has ensured that criminal convictions comport with the community's notions of fairness and equity.[31] The right not to be convicted without the concurrence of the community, in the form of a unanimous jury verdict, is an essential ingredient of due process in our system of law.

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[30] The power of a jury, but not a judge, to "indulge in precisely such motives or vagaries" (United States v. Dotterweich, *supra*, 320 U.S. at 279), provides the basis of the rule that permits inconsistency in a jury verdict, but requires consistency in the verdict of a judge. Compare United States v. Dunn, *supra*, with United States v. Maybury, *supra*.

[31] A recent study reveals that a jury frequently acquits, despite proof of the technical commission of a crime, because it views the offense as *de minimis*, it disagrees with the law, it believes that the defendant has been punished enough as a result of the crime, or it believes the punishment threatened—including the extra legal consequences of conviction—is too severe. KALVEN & ZEISEL, THE AMERICAN JURY 258-85; 286-97, 305, 306-12 (1966). Kalven and Zeisel report, based on evaluations of 3,567 jury trials by the trial judges, that the jury acquitted almost twice as often as would the trial judge. P. 56. The jury's sentiments on the law or about the particular defendant or crime explain or contribute to explaining 76% of the disagreements. P. 111.

**3. The Determination of Guilt or Innocence by a Trier Other than the Trial Judge is Often a Necessary Condition of a Fair and Rationally Conducted Trial.**

Several related, intensely practical, virtues of jury trial are recognized by every experienced criminal practitioner and have contributed to the enduring faith which American justice places in the jury system. Although these endemic characteristics of jury trial serve principally to protect the defendant, it would be a mistake to regard them merely as the instrument of partisan tactical advantage. Rather, they have proved in day-to-day administration of our criminal law vital contributing factors, and often indispensable conditions, of a fair and rational trial process. In this connection the obvious point must be emphasized that the American jury cannot realistically be viewed out of the context of the entire complex of institutions and procedures which have evolved for the administration of criminal law in this country. Other institutions and procedures—involving differently qualified and selected judges, different methods of investigating and determining issues or different conceptions of evidence and proof—might develop methods of assuring trial fairness without the intervention of a jury. The American system, however, has been designed principally with the jury in view and for a number of reasons its fair administration requires maintenance of the right to jury trial. In the following subsections, the most significant of those reasons are identified. The concerns which they involve may not in isolation rise to the stature of independent federal constitutional rights. But in combination they compellingly support recognition of the right to trial by jury as a guarantor of the fair and regular criminal trial that due process of law requires.

(a) *Denial of Trial by Jury Lessens the State's Burden of Persuasion.*

This Court has indicated that in a criminal case due process of law requires proof of guilt beyond a reasonable doubt. *Leland v. Oregon*, 343 U.S. 790 (1952). Of course, this standard was developed and defined in the context of trial by jury. See IX WIGMORE, EVIDENCE § 2497 (3d ed. 1940).. Since it is plain that a prosecutor carries a far lesser burden in convincing one man rather than twelve of a defendant's guilt beyond a reasonable doubt, the constitutional standard is weakened when a defendant is tried to a judge. Compare *Hibdon v. United States*, 204 F. 2d 834 (6th Cir. 1953).

In addition to the sheer weight of numbers, the diversity of a jury gives substance to the reasonable doubt standard, and insures that an accused will not be convicted unless jurors of varied backgrounds and outlook concur in the judgment.[32]

> The law has established this tribunal because it believed that, from its numbers, the mode of their selection, and the fact that the jurors came from all classes of society, they are better calculated to judge motives [and] weigh possibilities . . . than any single man, however pure, wise and eminent he may be. This is the theory of the law; and as applied to criminal accusations, it is eminently wise, and favorable alike to liberty and justice.

*People v. Garbutt, supra*, 17 Mich. at 22.

> Juries fairly chosen from different walks of life bring into the jury box a variety of different experiences, feelings, intuitions and habits. Such juries may reach completely different conclusions

[32] These same considerations have informed the Court's judgment in demanding that trial juries represent a fair cross section of the community. See pages 17-18, *supra*.

than would be reached by specialists in any given field.

*Toth v. Quarles, supra,* 350 U.S. at 17.

Moreover, a defendant is entitled to the interchange and testing of ideas before a criminal judgment against him is rendered. "The very object of the jury system is to secure unanimity by a comparison of views, and by agreement among the jurors themselves." *Allen v. United States,* 164 U.S. 492, 501 (1896). The verdict of a trial judge, not only represents the thinking of a single man, with all the danger of individual predispositions that this involves, it represents thinking untested by confrontation with the contrary views of others. The essential genius of the jury trial is its effect in neutralizing or diluting peculiar biases or predispositions that are held by all men "however pure, wise and eminent," and insuring that individual views will stand the test of confrontation and debate—that a judgment of conviction may emerge only if each juror becomes satisfied that guilt has been established beyond a reasonable doubt. Trial by judge denies the defendant these important protections.

(b) *The Determination of Guilt or Innocence by a Body Other Than the Trial Judge is a Necessary Adjunct of Constitutional Exclusionary Rules.*

Due process of law prohibits the introduction of evidence that was obtained in violation of the rights of the accused under the Fourth, Fifth or Sixth Amendments to the United States Constitution. *Mapp v. Ohio,* 367 U.S. 643 (1961); *Escobedo v. Illinois,* 378 U.S. 478 (1964); *Miranda v. Arizona,* 384 U.S. 436 (1966). These exclusionary rules apply without regard to the trustworthiness or reliability of the evidence in question, *Rogers v.*

*Richmond*, 365 U.S. 534 (1961), and frequently operate to exclude evidence, such as a confession, that is highly probative on the issues of guilt or innocence.

In a jury case, when the defense contends that evidence that the prosecution intends to offer is inadmissible under an exclusionary rule, a hearing is held by the trial judge, out of the presence of the jury, for the purpose of determining the validity of the constitutional claim. At this hearing, of course, the substance of the evidence in question is presented to the judge. The evidence can be submitted to the jury only if the trial judge determines, as a question of fact, that it has not been secured in violation of the constitutional rights of the defendant. See *Jackson v. Denno*, 378 U.S. 368 (1964).

In *Jackson v. Denno*, *supra*, the Court held that this separation of functions is mandatory under the Due Process Clause of the Fourteenth Amendment, and that the task of determining the admissibility of evidence—in *Jackson*, the voluntariness of a confession—cannot be delegated to the jury. The primary basis for the decision was the Court's recognition that jurors would be unable to exclude from their consideration a truthful, but involuntary, confession. 378 U.S. at 388-89.

Appellant submits that the dangers perceived by the Court in *Jackson v. Denno* exist whenever a single body determines both the admissibility of evidence and the guilt or innocence of the accused. It is fictitious to assume that in a close case, the judgment of the trial judge will not be influenced by his certain knowledge of guilt, derived from his exposure to a truthful, but inadmissible, confession, or from his exposure to highly incriminating, but constitu-

tionally inadmissible, physical evidence.[33] *Cf. Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Mr. Justice Jackson, concurring).

Proper operation of constitutional exclusionary rules and other rules relating to the exclusion of evidence, requires that the determination of admissibility not be made by the body determining guilt or innocence. Trial by jury permits the separation of these functions and guarantees the defendant's constitutional rights to have illegally obtained evidence and other inadmissible evidence "entirely disregarded". *Jackson v. Denno, supra*, 378 U.S. at 389.

(c) *Other Aspects of a Bench Trial Frequently Deny a Defendant An Impartial Determination of Guilt Upon Admissible Evidence.*

Contagion of the trial judge by proferred evidence which he hears in ruling on its "admissibility" is only one prejudicial incident of non-jury trials. It is no exaggeration to say that bench trials deny the defendant the benefit of most evidentiary rules. This is so for several reasons. "[I]t is virtually impossible to convince an appellate court that the receipt of inadmissible evidence in a bench trial was prejudicial. Although trial judges are given great credit by appellate judges for having reasoning powers that allow them to compartmentalize their minds and seg-

[33] That exposure to inadmissible evidence will, in fact, influence the judgment of a judge on the ultimate issue of guilt or innocence is confirmed by KALVEN & ZEISEL, THE AMERICAN JURY (1966). In connection with that work, questionnaires were distributed to cooperating trial judges for the purpose of analyzing the differences in the evaluation of identical cases by a judge and jury. Trial judges indicated the result they would reach before the jury returned its verdict in 3,576 cases. The authors found that in 828 cases, the judge would have convicted the defendant of the crime charged, but the jury did not do so. P. 110, Table 24. In thirteen percent of these cases, the judge pointed to facts that he knew but that could not be put before the jury as one explanation for the disagreement. P. III, Table 26. Certainly, there are cases in addition to this number in which such information has some conscious or subconscious influence on the trial judge but which would not be reported in this candid fashion.

regate admissible from inadmissible evidence in arriving at a verdict, as a practical matter trial judges are no less human than jurors." II AMSTERDAM, SEGAL & MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES, Section 317, at p. 2-247 (1967). Furthermore, the confusion of roles of the trial judge who also tries the facts tends to promote avoidance of clear cut rulings on evidentiary issues. "[I]n a bench case, some judges make it a practice to take defense objections to the admissibility of evidence under advisement, and then when it is clear that the prosecution has a sufficient case apart from the contested evidence, they will insulate themselves from reversal by announcing that they are not going to consider the evidence, but find the defendant guilty without it. This sort of evasion of tricky evidentiary issues cannot be worked in a jury trial." *Id.* at p. 2-248.

In addition, the judge frequently comes to the determination of the guilt question against a background that makes impartial appraisal of the admissible evidence impossible. Informed by prior contacts with the case or with the defendant that he is unable to avoid, the judge who sits on the guilt issue almost invariably knows the defendant's prior record and other unfavorable personal facts. Moreover, he approaches determinations of credibility with attitudes hardened by observation of prior trials to which the defendant was not a party; and it is no accident, in particular, that he tends to believe police witnesses, since the judge has probably heard the same officer testify against a dozen, or a hundred, guilty defendants. The impact of these factors varies from case to case, but it is not the unusual situation in which one or all of them preclude a bench-tried defendant from having his guilt or innocence fairly heard on the admitted and admissible evidence and nothing else.

(d) *A Bench Trial Tends to Deny the Defendant Adequate Determination and Review of Legal and Factual Questions.*

Finally, the judge's dual role in a non-jury trial obscures by commingling the questions of law and fact which it is the defendant's right to have fairly determined and fairly reviewed. In a jury trial, the principles of law applied are clearly articulated, since the judge must charge them to the jury. Limited but meaningful review is available of the jury's factual determination under the legal principles charged by the court. By contrast, where a judge is the trier of fact, no clear cut articulation or decision of either legal or factual questions is ordinarily made, and appellate review is severely hamstrung. Bench trials thus may not merely allow, but rather tend to promote arbitrariness (See Sec. C(1), *supra*); and, at best, they deprive the defendant of the essential conditions for a clear, visible and regular decision of the separate legal and factual questions upon which his conviction depends.

## VIII. *CONCLUSION*

In 1833, in his classic profile of "Democracy in America," De Tocqueville wrote that:

> "The institution of trial by jury . . . places the real direction of society in the hands of the governed, or a portion of the governed . . . He who punishes the criminal is therefore the real master of society . . ."

1 DE TOCQUEVILLE, *op. cit. supra* at 293.

At this point in our history, when vast power over

American life is exercised by an immense governmental structure in matters entirely unrelated to enforcement of the criminal law, it may be historical romanticism to adhere to the notion that the institution of the criminal jury "places the real direction of the society in the hands of the governed." But the role of dispensing criminal justice in a democracy is a particularly sensitive task and the right of the people to participate directly in this important function of government has been preserved in the form of the criminal jury. The increasing complexity and influence of modern government, where in most matters popular control is several times removed from the decision making process, underscores the urgency of preserving inviolate the direct voice of the community in the administration of the criminal law.

In *Washington v. Texas, supra,* Mr. Chief Justice Warren, for the Court, stated "the right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than other Sixth Amendment rights that we have previously held applicable to the States," 388 U.S. at 18. Appellant submits that the right of trial by jury,—"the most transcendent privilege which any subject can enjoy or wish for" [34]—similarly stands on no lesser footing than other Sixth Amendment rights, all of which have now been applied to state criminal proceedings by this Court. The judgment below should be reversed

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[34] III BLACKSTONE, *op. cit. supra* at *379.

and this matter remanded for a new trial before a jury that comports with the requirements of the Sixth Amendment.

Respectfully submitted,

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November, 1967.

## *APPENDIX A*

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment of the United States Constitution, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article VII, Section 41 of the Louisiana Constitution:

> . . . All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.

Article 779, Code of Criminal Procedure of Louisiana:

> Trial of Misdemeanors
>
> A defendant charged with a misdemeanor shall be tried by the court without a jury.

Louisiana Revised Statutes 14:2:

> § 2. Definitions

In this Code the terms enumerated shall have the designated meaning:

* * * * *

"Felony" is any crime for which an offender may be sentenced to death or imprisonment at hard labor.

* * * * *

"Misdemeanor" is any crime other than a felony.

* * * * *

Louisiana Revised Statutes 14:35:

§ 35. Simple battery

Simple battery is a battery, without the consent of the victim, committed without a dangerous weapon.

Whoever commits a simple battery shall be fined not more than three hundred dollars, or imprisoned for not more than two years, or both.

## *APPENDIX B*

### THE RIGHT TO TRIAL BY JURY OUTSIDE LOUISIANA

The following thirty-eight states guarantee a right to trial by jury equal to or greater than the right secured in federal courts under the Sixth Amendment. In each of these states, a defendant charged with an offense punishable by more than six months imprisonment is entitled to be tried by a twelve man jury, all of whom must concur in the verdict. Compare *Patton v. United States*, 281 U.S. 276 (1930).

*Alabama:* CONSTITUTION, art. 1, § 6, art. 1, § 11; Amendment XXXVII; ALA. CODE tit. 15, § 227; tit. 13, §§ 126, 327; tit. 7, § 264; tit. 13, §§ 424, 429; tit. 30, § 99(1) (1958); *Baader v. State*, 201 Ala. 76, 77 So. 370 (1917).

*Arizona:* CONSTITUTION, art. 2, § 24, art. 2, § 23; ARIZ. REV. STAT. ANN. § 21-102 (1956); § 21-103, § 22-301 (Supp. 1966), § 22-402 (1956); ARIZ. R. CRIM. P. 300.

*Arkansas:* CONSTITUTION, art. 2, § 10, art. 2, § 7; ARK. STAT. ANN. § 43-1901, § 43-2160 (1964).

*California:* CONSTITUTION, art. 1, § 7; *Ex parte Wong Yon Ting*, 106 Cal. 296, 39 Pac. 627 (1895); CAL. PEN. CODE ANN. § 1140 (1956); *People v. Howard*, 211 Cal. 322, 295 Pac. 333 (1930).

*Colorado:* CONSTITUTION, art. 2, § 16, art. 2, § 23; (See COLO. REV. STAT. ANN. § 79-15-4, *repealed*, Laws 1964, p. 436, § 73); COLO. REV. STAT. ANN. § 39-7-20.

*Connecticut:* CONSTITUTION, art. 1, § 8, art. 1, § 19; CONN. GEN. STAT. ANN. § 54-82 (1960), §§ 51-266, 51-273 (Supp. 1966); *State v. Gannon*, 75 Conn. 206, 52 Atl. 727 (1902).

*Delaware:* CONSTITUTION, art. 1, § 7, art. 1, § 4, art. 4, § 28; DEL. CODE ANN. tit. 10, § 4519 (1953); DEL. SUPER. CT. (CRIM.) R. 23(a)(b), 31 (1953); DEL. CODE ANN. tit. 11, § 2701 (Supp. 1966).

*Georgia:* CONSTITUTION, § 2-105, § 2-5101; GA. CODE ANN. § 59-707 (1965); *Sullivan v. State*, 29 Ga. App. 377, 115 S.E. 2d 290 (1923).

*Hawaii:* CONSTITUTION, art. 1, § 11; HAWAII REV. LAWS, § 231-9 (1955).

*Idaho:* CONSTITUTION, art. 1, § 7; *State v. Jutilla*, 34 Id. 595, 202 Pac. 566 (1921); IDAHO CODE ANN. § 18-113; *State v. Scheminisky*, 31 Id. 504, 508, 174 Pac. 611 (1918).

*Illinois:* CONSTITUTION, art. 2, § 9, art. 2, § 5; ILL. ANN. STAT. ch. 78, §§ 20, 23 (Smith-Hurd 1966); *People v. Lobb*, 17 Ill. 2d. 287, 161 N.E. 2d 325 (1959).

*Indiana:* CONSTITUTION, art. 1, § 13; IND. ANN. STAT. § 9-1501, § 9-1811 (1956).

*Kansas:* CONSTITUTION, Bill of Rights § 10, Bill of Rights § 5; KAN. GEN. STAT. ANN. § 62-1412, § 62-1501 (1964).

*Maine:* CONSTITUTION, art. 1, § 6; ME. R. CRIM. P. 23(b), 31(a).

*Maryland:* CONSTITUTION, Declaration of Rights, art. 21, art. 5; Md. Rules P. 743, 758.

*Massachusetts:* CONSTITUTION, Pt. 1 art. XII, § 13; *Jones v. Robbins*, 74 Mass. 329, 341, 343-45, 347 (1857); MASS. GEN. LAWS ANN. ch. 234, § 26B (Supp. 1966); ch. 234 § 33 (1959); *Commonwealth v. Bellino*, 320 Mass. 635, 71 N.E. 2d 411 (1947).

*Michigan:* CONSTITUTION, art. 1, § 20, art. 1, § 14; MICH. STAT. ANN. § 27.3936(13), § 28.1192 (1954).

*Minnesota:* CONSTITUTION, art. 1, § 6, art. 1, § 4; MINN. STAT. § 593.01 (1947).

*Mississippi:* CONSTITUTION, art. 3, § 26, art. 3, § 31; MISS. CODE ANN. § 1615; (Supp. 1966) §§ 1836, 1202 (1957).

*Missouri:* CONSTITUTION, art. 1, § 18(a), art. 1, § 22(a); MO. REV. STAT. § 546.390, § 543.250 (1959).

*Montana:* CONSTITUTION, art. 3, § 16, art. 3, § 23; MONT. REV. CODES ANN. § 94-116 (1964).

*Nebraska:* CONSTITUTION, art. 3, § 11, art. 3, § 6; NEB. REV. STAT. §§ 18-205, 18-201 (1962); § 29-2022 (1965).

*Nevada:* CONSTITUTION, art. 1, § 3; *State v. McClear*, 11 Nev. 39 (1876); NEV. REV. STAT. § 175.480 (1963).

*New Hampshire:* CONSTITUTION, pt. 1, art. 15; *State v. Ray*, 63 N.H. 406 (1885). *Opinion of the Justices*, 41 N.H. 550 (1860).

*New Jersey:* CONSTITUTION, art. 1, § 10, art. 1, § 9; N.J. STAT. ANN. § 2A:74-1 (1952); *State v. Gibson*, 15 N.J. 384, 105 A. 2d 1 (1959).

*New Mexico:* CONSTITUTION, art. 2, § 14, art. 2, § 12; N.M. STAT. ANN. § 36-12-3, § 36-2-5 (1964).

*North Carolina:* CONSTITUTION, art. 1, § 13, art. 1, § 19, art. IV, § 27; N.C. GEN. STAT. § 15-177, § 15-177.1, § 7-204, § 7-393 (1953); *State v. Berry*, 190 N.C. 363, 130 S.E. 12 (1925).

*North Dakota:* CONSTITUTION, art. 1, § 7; N.D. CENT. CODE § 40-18-17 (Supp. 1965), § 33-12-19, § 29-22-14 (1960).

*Ohio:* CONSTITUTION, art. 1, § 10, art. 1, § 5; OHIO REV. CODE ANN. § 2938.06, § 2945.77 (1964 Baldwin).

*Pennsylvania:* CONSTITUTION, art. 1, § 9, art. 1, § 6; *Commonwealth v. Widmeyer*, 149 Pa. Super. 91, 26 A. 2d 125 (1942); PA. STAT. ANN. tit. 17,

§ 1142; *Commonwealth v. Fugmann*, 330 Pa. 4, 28, 198 Atl. 99 (1938).

*Rhode Island:* CONSTITUTION, art. 1, § 10, art. 1, § 15; R.I. GEN. LAWS ANN. § 9-10-12 (1956).

*South Dakota:* CONSTITUTION, art. 6, § 7, art. 6, § 6; S.D. CODE § 34.3673 (Supp. 1960).

*Tennessee:* CONSTITUTION, art. 1, § 9, art. 1, § 6; TENN. CODE ANN. § 40-2504 (Supp. 1966); *Memphis v. Trigally*, 46 Tenn. 382 (1869); *Woods v. State*, 99 Tenn. 182, 41 S.W. 811 (1897).

*Vermont:* CONSTITUTION, ch. 1, art. 10, ch. 1, art. 12; VT. STAT. ANN. tit. 12, § 1505 (1958).

*Washington:* CONSTITUTION, art. 1, § 22, art. 1, § 21; WASH. REV. CODE ANN. § 2-36-050; § 3-20-040; § 35-20-090; § 35-20-030; § 10-61-040 (1965).

*West Virginia:* CONSTITUTION, art. 3, § 14; W. VA. CODE ANN. § 5175[50-18-7] (1961).

*Wisconsin:* CONSTITUTION, art. 1, § 7, art. 1, § 5; WIS. STAT. ANN. § 957-01, § 62.24, (Supp. 1967); § 959.01 (1958); *Rothbauer v. State*, 22 Wis. 468 (1868).

*Wyoming:* CONSTITUTION, art. 1, § 10, art. 1, § 9, art. 5, § 22; WYO. STAT. ANN. § 7-427, § 7-409, § 5-130, § 5-123 (1957).

The following five states guarantee a right to trial by jury in all cases in which a jury would be available in federal courts under the Sixth Amendment. A jury of less than twelve men is provided, however, in cases in which the maximum sentence may not exceed one year imprisonment.

*Alaska:* CONSTITUTION, art. 1, § 11; ALASKA STAT. § 22.15.150; § 22.15.060, § 11.75.030 (1962) (six jurors in District Magistrate Court).

*Iowa:* CONSTITUTION, art. 1, § 10, art. 1, § 9; IOWA

CODE §§ 602.39, 602.15, 687.7 (1966) (six jurors in Municipal Court).

*Kentucky:* CONSTITUTION, §§ 7, 11, 248; KY. REV. STAT. § 25.010, § 26.010 (Supp. 1966), KY. R. CRIM. P. 9.82 (six jurors in inferior courts).

*Oklahoma:* CONSTITUTION, art. 2, § 20, art. 2, § 19; OKLA. STAT. tit. 20, § 272, tit. 21, § 10 (1951) (six jurors in County Court). (The verdict in these misdemeanor cases may be rendered by three-fourths of the whole number of jurors).

*Virginia:* CONSTITUTION, art. 1, § 8, art. 1, § 11; VA. CODE § 19.1-206, § 18.1-9 (1960) (five jurors in misdemeanor cases).

*Texas* guarantees a right to trial by jury in all cases in which a jury would be available in federal courts under the Sixth Amendment. A jury of six men is provided, however, in the county court in cases in which the punishment may not exceed two years. In the district court, in misdemeanor cases, nine members of the jury may render a verdict. CONSTITUTION, art. 1, § 10, art. 1, § 15, art. 5, § 17; TEX. CODE CRIM. P. ANN. art. 4.07 (1966); TEX. PEN. CODE ANN. art. 1148 (1961); TEX. CODE CRIM. P. ANN. art. 37.02 (1966).

The following two states guarantee a right to trial by jury for all offenses in which a jury would be available in federal courts under the Sixth Amendment. A jury of less than twelve men is provided, however, for all but capital cases.

*Florida:* CONSTITUTION, Declaration of Rights §§ 11, 3, art. 5, § 22; FLA. STAT. § 913.10, § 919.10 (1965) (six jurors in all cases not capital).

*Utah:* CONSTITUTION, art. 1, § 12, art. 1, § 10; UTAH CODE ANN. § 78-46-5 (1953) (eight in courts

of general jurisdiction, four in courts of inferior jurisdiction).

*Oregon* guarantees a right to trial by jury for all offenses in which a jury would be available in federal courts under the Sixth Amendment. Ten members of the jury are permitted to render a verdict, however, in all cases except first degree murder. CONSTITUTION, art. 1, § 11; ORE. REV. STAT. 136.610 (1957).

*South Carolina* guarantees a right to trial by jury for all offenses in which a jury would be available in federal courts under the Sixth Amendment. However, in all but a group of the most serious crimes, a six man jury is provided. CONSTITUTION, art. 1, § 18, art. 1, § 25, art. 5, § 22; S.C. CODE § 15-618, § 15-612 (1962).

*New York* guarantees a right to trial by jury for all offenses in which a jury trial would be available under the Sixth Amendment in all areas outside of New York City. However, outside New York City a six man jury is provided for offenses where the maximum potential sentence does not exceed one year imprisonment. In New York City jury trials are denied where the maximum potential sentence does not exceed one year. CONSTITUTION, art. 1, § 2, art. 6, § 18; PENAL LAW § 1937 (1944); CODE CRIM. P. §§ 702, 710 (1958); N.Y.C. CRIM. CT. ACT. § 40 (1966); N.Y.C. CRIM. CT. ACT. § 31 (1963); *People v. Sanabria*, 42 Misc. 2d 464, 249 N.Y.S. 2d 66, 71 (App. Div. 1964).

## APPENDIX C

### THE RIGHT TO TRIAL BY JURY IN LOUISIANA

1. Existing Provisions of Law

The right to trial by jury in Louisiana depends primarily on the question of whether the Court may or must impose a sentence "at hard labor." If the statute defining the crime does not provide that a person convicted may be imprisoned at hard labor, the matter must be tried by the court without a jury. Article 7, Section 41 of the Louisiana Constitution, Article 779 of the Code of Criminal Procedure of Louisiana; See Appendix A, *supra*. If the statute defining the crime provides that the court *may* sentence a convicted defendant to a term of imprisonment at hard labor, a defendant is entitled, under Louisiana law, to be tried before a five man jury. Article 7, Section 41, Louisiana Constitution; Article 782 of the Code of Criminal Procedure of Louisiana. If the statute defining the crime provides that the sentence *must* be at hard labor, Louisiana law provides for a twelve man jury, only nine of whom must concur in a verdict. *Ibid.* In capital cases, a unanimous verdict of a jury of twelve is required. *Ibid.*

Among the offenses which are not punishable at hard labor and therefore categorized as misdemeanors for which there is no trial by jury are:

> Aggravated battery resulting from breach of the peace. LA. REV. STAT. 14:34.1 (Cum. Supp. 1962) (ten years maximum imprisonment).
>
> Indecent behavior with juveniles. LA. REV. STAT. 14:81 (Cum. Supp. 1962) (two years maximum imprisonment).

Contributing to the delinquency of a juvenile. LA. REV. STAT. ANN. 14:92 (Supp. 1966) (two years maximum imprisonment).

Aggravated assault. LA. REV. STAT. 14:37 (1950) (two years maximum imprisonment).

Among the offenses for which imprisonment *may* be at hard labor and are therefore triable by a jury of five are:

Aggravated criminal damage to property. LA. REV. STAT. 14:55 (1950) (fifteen years maximum imprisonment).

Aggravated battery. LA. REV. STAT. 14:34 (1950) (ten years maximum imprisonment).

Forgery. LA. REV. STAT. 14:72 (1950) (ten years maximum imprisonment).

The *only* charges in Louisiana on which an accused is entitled to a twelve man jury whose verdict must be unanimous are murder LA. REV. STAT. 14:30 (1950), aggravated rape LA. REV. STAT. 14:42 (1950), and aggravated kidnapping LA. REV. STAT. 14:44 (1950)..

2. The Historical Development of the Jury Trial Provisions of Louisiana Law.

The Territory of Orleans, which was coextensive with the present boundaries of the State of Louisiana, was created by the United States Congress by the Act of March 26, 1804, c. 38, 2 Stat. 283. Section 5 of that Act provided for trial by jury in all criminal cases.

On May 4, 1805, the Legislative Council of the Territory of Orleans passed "An Act for the punishment of crimes and misdemeanors." Section 33 ordained that criminal procedure would be "in conformity with the common law of England." Section 34 provided:

that the trial of every person, for any of the crimes and misdemeanors aforesaid, shall be by jury, if the party accused or the person who prosecutes desires it.

The Federal Enabling Act of Feb. 20, 1811, c. 21, 2 Stat. 641, authorized the people of the Territory of Orleans to draw up a state constitution, the provisions of which, *inter alia*, "shall secure to the citizen the trial by jury in all criminal cases * * * ." Sec. 3. The State of Louisiana was admitted to the Union by the Act of April 8, 1812, c. 50, 2 Stat. 701.

In its first constitution, ratified in 1812, Louisiana guaranteed, "in all criminal prosecutions . . . trial by an impartial jury of the vicinage." 3 WEST'S L.S.A. CONST. 522 (1955). The right to trial by jury in all criminal prosecutions was retained in the subsequent constitutions of 1845 (Art. 107, 3 WEST'S L.S.A. CONST. 536), 1852 (Art. 109, 3 WEST'S L.S.A. CONST. 556), and 1864 (Title VII, Art. 105, 3 WEST'S L.S.A. CONST. 588).

The first diminution of the right to trial by jury in Louisiana appears in the constitution of 1879, which provided that "where the penalty is not necessarily imprisonment at hard labor or death, the General Assembly may provide for the trial thereof by a jury, less than twelve in number . . . " Bill of Rights, Art. 7, 3 WEST'S L.S.A. CONST. 612 (1955). The following year, the legislature passed "An Act to provide for the trial of offenses where the penalty is not necessarily imprisonment at hard labor or death," Section 4 of which established a five-man jury for such cases. Act 35 of March 17, 1880.

The constitution of 1898 went further and entirely eliminated the right of one charged with a crime not pun-

ishable by imprisonment at hard labor—the so-called misdemeanor in Louisiana—to be tried by jury, even the truncated five-man jury. Art. 9. Art. 116 provides that:

> All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, which shall not be prior to 1904, be tried by the judge without a jury. . . . 3 WEST'S L.S.A. CONST. 694 (1955).

Art. 116 further provided that in non-capital cases where the punishment is necessarily at hard labor, only nine jurors need concur in a guilty verdict. 3 WEST'S L.S.A. CONST. 694 (1955). Although there have been various amendments and codifications of the Louisiana statutory and constitutional provisions relating to trial by jury since the 1898 constitution, there has been no substantive change in the law. See *State v. Garrison*, 243 La. 787, 843, 154 So. 2d 400, 420 (1963), reversed on other grounds *sub nom. Garrison v. Louisiana*, 379 U.S. 64 (1964).

Thus, the aberrant provisions of Louisiana law relating to trial by jury were not derived from Louisiana's Civil Law heritage. From 1805, prior to Louisiana's admission to the union, and consistently until 1879 the common law jury trial right was in full force and effect. Modifications of that right resulted from constitutional changes in 1879 and 1898.

FILED
DEC 22 1967
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 410

GARY DUNCAN,

Appellant,

*against*

STATE OF LOUISIANA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

## BRIEF OF THE STATE OF NEW YORK AS AMICUS CURIAE

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 410

GARY DUNCAN,

Appellant,

*against*

STATE OF LOUISIANA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

## BRIEF OF THE STATE OF NEW YORK AS AMICUS CURIAE

### Interest of the Amicus

This case raises the question whether the Sixth Amendment's guarantee of a jury trial in all criminal proceedings applies to the states and, if it does, whether the state courts can only dispense with jury trials in the types of cases which it has heretofore been held that the federal courts may try without a jury.

In New York, the Legislature has authorized the Criminal Court of the City of New York to try and determine

all charges of the grade of misdemeanor or less (except charges of libel). N. Y. City Criminal Court Act § 31. All trials in that court are before one judge without a jury except that in cases of misdemeanors other than gambling offenses a defendant has the right, upon his request, to be tried before three judges. N. Y. City Criminal Court Act § 40. Outside of New York City, misdemeanors are tried by the court without a jury unless the defendant demands a jury trial. N. Y. Code Crim. Proc. § 701. If the defendant exercises his right to demand a jury trial, N. Y. Code of Crim. Proc. § 702, he is entitled to a jury of six rather than a common law jury. N. Y. Code of Crim. Proc. § 710. Since there are thus many situations in which the State of New York does not require a trial by a common law jury for misdemeanors and since any ruling the Court might make in this case could therefore have a substantial impact on the present system of the administration of the criminal law in New York, the Attorney General of the State of New York, the chief legal officer of the State (N. Y. Executive Law § 63), considers it necessary and appropriate to file this brief amicus curiae pursuant to Rule 42 of the Court.

This brief attempts to examine the rationale for and limits of the Sixth Amendment's guarantee of a jury trial and to demonstrate that the provisions of New York law relating to jury trials are within the permissible limits of the Sixth Amendment.

## Question Presented

The Court has previously held that the Sixth Amendment's guarantee of jury trials is not binding upon the states, *Maxwell* v. *Dow*, 176 U. S. 581, and if this conclusion is followed there can obviously be no constitutional infirmity in New York's system of dispensing with jury trials in a certain class of cases. However, assuming

*arguendo* that the jury trial guarantee of the Sixth Amendment is binding upon the states, under what circumstances can the states constitutionally dispense with jury trials in criminal prosecutions?

## ARGUMENT

### The New York system of dispensing with trial by jury in a certain class of cases fully comports with the Sixth Amendment.

Although the United States Constitution commands that the "Trial of all crimes, except in cases of Impeachment, shall be by Jury", Art. III, § 2, and that "in all criminal prosecutions, the accused shall enjoy the right to . . . trial by an impartial jury", Amendment VI, the extent of the applicability of these provisions even in federal trials is not free from doubt. The one constant assumption has been that these provisions do not apply to *all* criminal proceedings and that there is a class of cases for which there is no constitutional right to a trial by jury.

Thus, the history of the common law prior to the adoption of the Constitution reveals a common understanding that many offenses, because of their nature and consequences, were properly tried summarily before a magistrate without a jury. See, *Frankfurter* and *Corcoran*, "Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury", 39 Harvard L. Rev. 917 (1926). Although there is no apparent unifying principle upon which summary trial was based, *id.* at p. 927, this Court has fashioned two separate standards for determining when a jury trial may be dispensed with. The Court has first looked to the nature of the offense and then to the nature and severity of possible punishment. Applying either of these tests, it is submitted that the New York procedure of dispensing with jury trials in a certain class of cases is consistent with the Constitution.

With respect to the type or nature of the offense, it has generally been held that the federal courts may try "petty", as opposed to "serious", crimes without a jury and this distinction apparently encompasses the traditional distinction between felonies and misdemeanors. *Schick* v. *United States,* 195 U. S. 65. More specifically, the so-called "petty offenses" for which a jury trial is not required seem to be those which were not indictable offenses at common law and are, therefore, not considered to be "crimes" within the meaning of Article III of the Constitution. *District of Columbia* v. *Colts,* 282 U. S. 63. Indeed, the purpose of the constitutional guarantee of trial by jury was to insure that jury trials would be provided in all situations in which the common law required such a procedure but not to extend jury trials beyond their applicability at common law. *Ex Parte Quirin,* 317 U. S. 1.

Similarly, a jury trial is constitutionally guaranteed in New York "in all cases in which it has heretofore been guaranteed", N. Y. Const. Art. I, § 2, and this has been held to mean that trial by jury is not required in misdemeanor cases because there was no common law right to trial by jury in cases of petty offenses tried in inferior courts. *People ex rel. Frank* v. *McCann,* 253 N. Y. 221, 170 N. E. 898. Moreover, all "infamous crimes" (except impeachment, military crimes and petit larceny) must be prosecuted by indictment, N. Y. Const. Art. I, § 4, and only in cases of crimes not prosecuted by indictment is the Legislature authorized to provide that trials may be held by the court without a jury. N. Y. Const. Art. VI, § 18(a). The phrase "infamous crimes" embodies the traditional distinction between felonies and misdemeanors. *People* v. *Bellinger,* 269 N. Y. 265, 199 N. E. 213.

Thus, the general approach in both federal and New York law is to require jury trials only in "serious" rather than "petty" offenses and to distinguish between the two

classes of cases according to whether or not a particular crime was an indictable offense at common law. Testing the "seriousness" of the offense by examining whether it would have been an indictable felony rather than a misdemeanor at common law not only is consistent with the sources of our jurisprudence (see, Plunknett, A Concise History of The Common Law [5th Ed. 1956] p. 438) but also is the only workable objective test relating to the nature of the offense. Resort to more general concepts of "gravity" or "seriousness" in this regard would mean in effect that this Court would be required to classify virtually every crime of less than a felony according to whether or not it was "serious" enough to require a jury trial.

Since New York only dispenses with jury trials in misdemeanor offenses that were not indictable offenses at common law,* the New York practice conforms with the federal standard relating to the nature of the crime charged and is consistent with the Sixth Amendment. Any disposition the Court makes of the case at bar should leave the states free to distinguish between serious and petty offenses according to whether the offense was indictable at common law and to try without a jury those offenses that were not indictable and were therefore tried without a jury at common law.

Even if an offense is "petty" in the sense that it was not indictable or tried by a jury at common law, the Court has also looked to the nature and severity of possible punishment as a test for determining whether or not a jury trial is required by the Constitution. *District of Columbia* v. *Clawans*, 300 U. S. 617. By this test, an offense

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* Even in such cases, a judge of a court which tries indictments can certify that the case should proceed by indictment and in that event the case is removed from the inferior court for presentment to a grand jury. N. Y. City Criminal Court Act § 32; N. Y. Code of Crim. Proc. § 57.

that is "petty" by nature may nonetheless be classified as "serious" because of a comparatively serious sentence. Although no specific length of sentence has been held to be a maximum permissible for an offense to be tried without a jury, the Court has upheld federal convictions in cases involving a six-month sentence. See, *Cheff* v. *Schnackenberg*, 384 U. S. 373.

Congress has provided that "petty" offenses are a class of misdemeanors with a six-month maximum sentence, 18 U.S.C. § 1, but this six-month statutory rule has never been held to be constitutionally mandated. Indeed, it appears to have been a more or less arbitrary line drawn by Congress for describing a class of misdemeanors rather than an attempt to define the maximum constitutional limitation of sentence for offenses tried without a jury. See, *Duke* v. *United States*, 301 U. S. 492. The legislative history of 18 U.S.C. § 1 suggests that this Congress was of the view that offenses punishable by imprisonment of at least up to one year could constitutionally be tried in the federal courts without a jury and settled upon six months in order to fall well within constitutional requirements. See 72 Cong. Rec. 9992 (1930). This view has been recognized by the Court to be consistent with the common law, *District of Columbia* v. *Clawans*, *supra* at p. 626, and there do appear to have been offenses triable without a jury at common law which were punishable by at least one year's imprisonment. *Frankfurter* and *Corcoran*, *supra*, at pp. 932-933. In light of the common law tradition and the legislative history of 18 U.S.C. § 1 it can hardly be said that the six-month standard usually applied in the federal courts is a constitutional standard which should be imposed upon the states in the event that the jury trial provisions of the Sixth Amendment is applicable to state criminal proceedings.

In New York, a misdemeanor (the only type of offense which under New York law may be tried without a common

law jury) is defined as an offense other than a traffic violation for which a sentence of more than fifteen days but not in excess of one year may be imposed. N. Y. Penal Law § 10.00 (4). This limitation is fully consistent with the common law limitations on trials without a jury and should not be replaced by the six-month standard imposed by Congress and the Court pursuant to supervisory powers over federal criminal proceedings.

The reason for dispensing with jury trials in certain cases at common law was essentially "the desire for a swift and convenient remedy" *Frankfurter* and *Corcoran, supra,* at page 927. This reason continues to be applicable today and is beneficial to defendants and the People alike. A wide variety of offenses carrying relatively minor penalties must be tried and disposed of quickly in order to protect an innocent defendant from having a criminal charge pending against him for a period of time longer than that for which he could be imprisoned if he were found guilty. This is particularly necessary for a defendant who is held on bail and could be severely prejudiced by having to wait many months for his case to take its place on an already congested jury trial calendar. The necessity for providing speedy disposition of minor offenses is equally apparent from the State's point of view. The volume of cases handled by the New York City Criminal Court is tremendous* and the strain on the judicial system of convening a common law jury for each minor offense is obvious.

Such considerations were persuasive at common law and remain so today. New York has followed the common law traditions and drawn the line between cases in which a common law jury is required and those in which such a

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* In 1964 there were over three million arraignments and over two million convictions in the New York City Criminal Court; three judge panels tried 11,678 cases to conclusion, resulting in 7,136 convictions. Annual Report of the New York City Criminal Court (1964), Table 1, pp. 12-17.

jury is not required at non-indictable offenses with a maximum imprisonment of one year. This conclusion, we submit, is fully consistent with the Sixth Amendment and should not be replaced by a six-month standard that represents a more or less arbitrary time period with nothing in the common law to support it as a cut-off point. While such a standard is considered by Congress to be appropriate for federal trials, the effort to provide speedy dispositions in the New York City Criminal Court, which handles a volume of cases significantly larger than the federal courts, calls for permitting a somewhat wider range of punishment in non-jury cases. In this light, the New York system of dispensing with common law jury trials in circumstances where that would have been the result at common law is fully in accord with the Sixth Amendment.

## CONCLUSION

**The Court should render a decision which does not interfere with trial without a jury in the class of criminal prosecutions in which it is permitted in New York.**

Dated: New York, New York, December 19, 1967.

Respectfully submitted,

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No. 410

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# In the Supreme Court of the United States

OCTOBER TERM, 1967

GARY DUNCAN,

Appellant,

v.

STATE OF LOUISIANA,

Appellee.

On Appeal from the Supreme Court of Louisiana

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*Trouble with the Jury System*, 1 American Inst. of Criminal Law and Criminology, 959 ..... 120

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*Archbold's Criminal Pleading*, (1943) p. 931 ..... 29

Elliott & McDonald, *Western Political Heritage*, p. 247 ..... 30

Wormser, *The Law*, p. 404 ..... 30

8 *The History of N. America*, pp. 239-253 ..... 30

Freed, *Aspects of French Criminal Procedure*, 17 La. L. Rev. 730 ..... 30

Pugh, *Adm. of Criminal Justice in France*, 23 La. L. Rev. 1 ..... 30

McCart, *Trial by Jury*, p. 14 ..... 30

Wigmore, *Panorama of the World's Legal Systems*, pp. 408-409 ..... 30

McGinty, *A History of Louisiana*, pp. 106-107 .... 31

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*Complete Works of Edward Livingston on Criminal Jurisprudence*, Title XIX, Chap. 1, Sec. 1, Art. 406 ..... 33

*In Re Glassberg*, 230 La. 396, 88 So. 2d 707 (1956) ..... 34

Bennett, *The La. Criminal Code*, 5 La. Law Rev. 6 (1942) ..... 34

*Opinions of the Atty. Gen.—State of La.*, 1928-30, p. 632 ..... 34

Brennen, *Bill of Rights & States*, 36 N.Y. Univ. L. Rev. 773 ..... 39

Smith, *What Has Happened to the Tenth Amendment*, 10 La. Bar Journal 21, 29-32 (1962) .. 41

Beth, *The Slaughterhouse Cases Revisited*, 23 La. Law Rev. 487 (1963) ..... 41

Reeve, *2 History of Eng. Law*, 43 ..... 45

Kent, 2 Com. 13 ..... 46

*Bac. Abr. Juries*, 7th Ed. Lond., n. Reeve, H.L. 41 ..... 46

3 Churchill, *A History of the English Speaking Peoples, the Age of Revolution*, pp. 146-147 .. 48

*The Adamson Case, A Study in Constitutional Technique*, 58 Yale L.J. 268, (1949) ..... 64

Graham, *The Conspiracy Theory of the Fourteenth Amendment*, 47 Yale, L.J. 371, 392 (1938) ..... 64

Deutsch, *Civil Law Influences on the Development of Civil Liberties*, 12 Tulane L. Rev. 331 (1938) ..... 65

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Corwin, *The Constitution and What it Means Today*, (1958) p. 250 ..... 69
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Wolbrette, *Detention for Questioning in La.*, 39 Tulane Law Rev. 69 (1964) ..... 68

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No. 410

# In the Supreme Court of the United States

OCTOBER TERM, 1967

GARY DUNCAN,

Appellant,

v.

STATE OF LOUISIANA,

Appellee.

## BRIEF FOR APPELLEE

## I. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the due process clause of the Fourteenth Amendment of the United States Constitution; Articles 779, 780 and 782 of the Louisiana Code of Criminal Procedure; Article 1, Section 9, and Article 7, Sections 41 and 42 of the Louisiana Constitution; and Louisiana Revised Statutes 14:2, 14:33, 14:34, and 14:35. These provisions are reprinted in Appendix "A" infra.

## II. QUESTIONS PRESENTED

1. Does a prosecution under a State law which provides trial by a judge without a jury of a misdemeanor charge of simple battery as defined in R.S. 14:35, where a two year prison term *in parish jail without hard labor* may be imposed, but in which *two months was actually imposed*, violate the Sixth

and Fourteenth Amendments to the United States Constitution?

2. Does the Sixth Amendment jury provision make it mandatory that an accused be found guilty in state court by a 12-man unanimous jury?

3. If the Sixth Amendment jury trial right is applicable to the state through the Fourteenth Amendment, does the mechanical federal rule which denies the constitutional right to a jury trial when the actual sentence is six months or less, apply in state courts?

4. Does the requirement of jury trial in federal court, when the actual sentence is more than six months, which was prescribed by the United States Supreme Court under its supervisory power over lower Federal Courts, determine procedural due process in state criminal trials?

## III. STATEMENT OF THE FACTS OF THE CASE

On December 5, 1966, a bill of information charging the appellant, Gary Duncan, with the crime of simple battery in violation of Louisiana R.S. 14:35 (1950) was filed in the Twenty-Fifth Judicial District Court of Louisiana (App. 1). On December 7, 1966, the appellant was arraigned and entered a plea of not guilty, and a trial date was fixed (App. 3).

Appellant filed a formal demand for jury trial prior to trial on January 25, 1967 (App. 4). Appellant cited authorities and was given an opportunity to urge his point on oral argument (App. 18-19). Be-

cause the offense charged was only a misdemeanor (Louisiana R.S. 14:2, 35 (1950) and because Louisiana Law authorizes no jury trial for such an offense (Louisiana Code of Criminal Procedure, Article 779), the trial judge denied the appellant's demand (App. 19).

On January 25, 1967, the appellant was tried in open court by the trial judge without a jury (App. 18-19). The facts surrounding the charge against the appellant were developed at trial as follows:

On the afternoon of October 18, 1966, the appellant, age nineteen (App. 62) was driving his car on Highway 23 in Boothville, Louisiana (App. 21, 24, 25, 43, 58-9). He stopped upon seeing four boys, age 14 (App. 20, 30, 43), talking to two other boys, one fourteen years old (App. 5) and the other sixteen years old (App. 58) on the side of the highway (App. 21, 26, 43, 52, 58-9). All witnesses, the State's and defendant's, testified that, after the exchange of a few words, the appellant struck the victim, one of the four young boys, on his arm. (App. 21, 28, 31, 44, 48, 52, 54, 57, 59) Appellant himself admitted on the witness stand that he made physical contact with the victim without the victim's consent (App. 64, 67, 71). This was the only blow struck by any party to this transaction.

The appellant was found guilty of simple battery (App. 73) and was sentenced to pay a fine of One Hundred Fifty ($150:00) Dollars and costs and to serve sixty days in the Parish Prison (App. 8). In

the event the fine and costs were not paid, the defendant was to serve an additional twenty days (App. 8).

It is significant that the prison sentence actually levied was for only a period of sixty days.

On February 20, 1967, appellant's request for a writ of certiorari, on the sole issue of entitlement to jury trial, was denied by the Supreme Court of the State of Louisiana (App. 14). Thereafter, appellant filed this appeal with the United States Supreme Court.

## IV. SUMMARY OF ARGUMENT

Appellant's conviction of simple battery followed by a sentence of sixty days in the parish jail is equivalent to a proceeding to prosecute a petty offense which under the doctrine of this Court in *Cheff v. Schakenberg*, 384 U.S. 373, does not require a jury trial. Both the nature of simple battery and the actual sentence imposed on appellant meet the test of "petty offense" as set forth in *Cheff*, supra.

Therefore, even if the Sixth Amendment jury trial right applied to the States, appellant's conviction without a jury is proper. Consequently, this Court need not reach the constitutional question of applicability of said Sixth Amendment Guarantee.

In the alternative, if this Court should determine that appellant's conviction is not equivalent to a proceeding to prosecute a petty offense under the federal standard, the argument which follows is presented on the constitutional question.

The history of the jury trial right shows that the right to modify or abolish jury trial was reserved and used extensively by Parliament, and in the colonies, by the colonial, and later the state, legislatures. The Sixth Amendment was intended only as an ironclad restriction on the power of Congress to make changes in jury trials in federal courts. The States reserved to themselves (cf. Ninth and Tenth Amendments) the unrestricted power to change their own constitutional and statutory provisions regarding jury trials. When the Fourteenth Amendment was ratified, it did not take this reserved power from the States; nor did it transfer to the federal government the power to regulate jury trials in state courts. In many states today, misdemeanors carrying more than the six-months' penalty prescribed by federal law are tried without a jury.

This Court has never held that the Bill of Rights applied directly to the States or is incorporated in the Due Process Clause as a code of criminal procedure for the States. The fact that some rights included in the Bill of Rights have been held to be essential to due process does not mean that all rights specified therein must be applied to the States. Every right included in the Bill of Rights which has been applied to the States under the due process clause of the Fourteenth Amendment has been so applied only because it was held to be fundamental to liberty and justice, and in the case of Sixth Amendment rights, essential to a fair trial.

This Court has consistently held that a jury trial

is not essential to due process and that a fair trial may be had without a jury. This Court has consistently held that the Fifth Amendment right of indictment by grand jury for infamous offenses, the Sixth Amendment right of trial by jury in criminal prosecutions, and the Seventh Amendment right of trial by jury in suits at common law involving more than Twenty ($20.00) Dollars, all of which are comparable rights, do not apply to proceedings in state courts because they are not essential to a fair trial.

If this Court were to hold the Sixth Amendment jury trial right directly applicable to the States, conviction by a twelve-man unanimous verdict in all state courts would be constitutionally required for all but offenses considered "petty" under the federal, rather than the state, definition. The number of jurors required under the Sixth Amendment is dictated by antiquity rather than by any relationship to a fair trial, and the federal definition of a petty crime is based on an arbitrary six-months figure which has no relationship to a fair trial. Despite the fact that such standards have no relationship to a fair trial, many States would, under the Sixth Amendment application, be required to change their criminal jury procedures to conform with that of the federal courts. Such a result was never intended by the due process clause of the Fourteenth Amendment.

In the further alternative, if this Court should hold the Sixth Amendment jury trial right directly applicable to the States, it should declare that its holding is not retroactive in order to avoid throwing state

criminal procedures into utter chaos and exacerbating the already burgeoning crime rate.

## V. ARGUMENT

### A. THE SIXTY DAY SENTENCE ACTUALLY IMPOSED IN THE CASE AT BAR RENDERS APPELLANT'S TRIAL WITHOUT A JURY CONSTITUTIONAL EVEN IF THE SIXTH AMENDMENT JURY TRIAL PROVISION WERE APPLIED TO THE STATES.

For the reasons which follow, it is not necessary for this Court to reach the constitutional issues presented in appellant's brief.

1. *Cheff v. Schakenberg, 384 U.S. 373 (1966), this Court's latest pronouncement on the subject, considers the actual sentence imposed and not the maximum potential sentence as determinative.*

In *Cheff v. Schakenberg, supra,* this Court held that a federal court could constitutionally try a defendant for criminal contempt without a jury provided that the *actual* sentence imposed upon a finding of guilt was no greater than six months. The Court classified criminal contempt when the actual penalty imposed is six months or less as equivalent to a petty offense which constitutionally need not be tried by jury.

The sentence which may be imposed for criminal contempt is unlimited. Congress has left the length of such sentences to the discretion of the federal courts, 18 U.S.C. § 402. Sentences of *more than two years*

for criminal contempt in relatively recent times are not uncommon:

> "See, e.g. *Brown v. United States*, 359 U.S. 41, 79 S.Ct. 539, 3 L.Ed. 2d 609 (15 months); *Piemonte v. United States*, 367 U.S. 556, 81 S.Ct. 1720, 6 L.Ed. 2d 1028 (18 months); *Reina v. United States*, 364 U.S. 507, 81 S.Ct. 260, 5 L.Ed. 2d 249 (two years) *Green v. United States*, *supra* (three years); *Collins v. United States*, 9 Cir., 269 F.2d 745 (three years); *United States v. Thompson*, 2 Cir., 214 F. 2d 545 (four years).
>
> In the fiscal year ending June 30, 1962, a total of 21 people convicted by a federal court of contempt were received by the federal prison system. Of these, the average sentence was 6.4 months. Sentences of eight of these prisoners exceeded six months; three prisoners had sentences exceeding one year, and of these two prisoners had sentences of two years or more. The Federal Prison System—1964, Hearing before the Subcommittee on National Penitentiaries of the Senate Committee on the Judiciary, 88th Cong., 2d Sess. (Jan. 22, 1964), p. 10." *Cheff. v. Schakenberg*, 384 U.S. at 385, n. 3.

See also *Schillitani v. United States*, 384, U.S. 364 (1966) wherein this Court authorized the imposition of a two-year sentence for contempt without a jury trial through the semantic device of denominating as a "civil contempt" what the lower federal court had characterized as a "criminal contempt". See Justice Harlan's dissent, 384 U.S. at 983-984.

Manifestly, this Court in the *Cheff* decision, *supra*, did not consider the *maximum potential* sentence

as determining the right to a jury trial under the Sixth Amendment, but based its decision on the sentence actually imposed.

In the case at bar, while the maximum potential sentence for simple battery under R.S. 14:35 is two years imprisonment (without hard labor, in the parish jail) the sentence which was actually imposed on appellant was sixty days imprisonment in the parish jail.

Clearly, under the rationale and the holding of the *Cheff* decision, *supra*, appellant's trial without a jury would be constitutional even if the Sixth Amendment jury trial provision were applied to the States, because the sentence actually imposed on Appellant was less than the six months' limitation of the *Cheff.* decision, 384 U.S. at 380.

2. *The nature of simple battery as defined in R.S. 14:35 does not warrant its treatment as a serious crime.*

(1). *Frame of Reference*

According to English common law, the power of Parliament to provide for non-jury trials extended to more than just "petty offenses". Prosecution of some serious crimes such as arson, a felony, was accomplished without a jury in England. See 22 & 23 Car. II, c. 7 (1670); Frankfurter & Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harvard Law Review 917, 927, 960, (1926); Kaye, Petty Offenders Have No Peers, 26 University of Chicago Law Review, 245, 247 (1959). *In United States v. Bishop*, 261 F. Supp. 969, 974, 975 (1966),

the power of Parliament and of colonial legislatures to direct that crimes, without reference to their nature as serious or petty, should be tried without a jury was acknowledged. See also Kaye, Petty Offenders Have No Peers, 26 University of Chicago Law Review at 246-257 (1959). Blackstone's complaint that non-jury procedure "has of late been so far extended, as, if a check be not timely given, to threaten the disuse of our admirable and truly English trial by jury, unless only in *capital* cases" shows the constantly increasing scope of summary jurisdiction in Blackstone's England. See 4 Blackstone's Commentaries 277-78. Writing of 18th Century England, Holdsworth points out the extensive stream of statutes extending the number and variety of summary penal proceedings without indictment or trial by jury before one or more justices of the peace. 10 Holdsworth History of English Law 159-160 (1938). In the Fourth Institute Coke states that Parliament's power and jurisdiction is "so transcendent and absolute as it cannot be confined either for causes or persons within any bounds". 4 Coke's Institutes 36; see Lyon, Edward Coke (Houghton Mifflin 1929), p. 354, p. 348, "The supremacy of Parliament which Coke advocated during his years in the House of Commons, after his removal from the bench". See also Radcliffe & Cross, The English Legal System (3d ed. 1953) pp. 174, 175.

With reference to jury trials in federal court, the Sixth Amendment has been judicially interpreted as "preservative"; i.e. Jury trial in federal court was "frozen" as of the time of the Sixth Amendment's

adoption, Congress being powerless to make changes therein. According to this interpretation, based on the "freezing principle" those crimes triable by jury in England and in the States at the time of the adoption of the Sixth Amendment required trial by jury in federal court. Conversely, those crimes triable summarily by justices of the peace or other magistrate without a jury in England or in the States when the Sixth Amendment was adopted were excepted from that Amendment's operation. The latter were designated by this Court as "petty offenses". See *Callan v. Wilson*, 127 U.S. 540 and *Schick v. United States*, 195 U.S. 65. Because such offenses were categorized by reference to English common law, summary practice which Parliament constantly modified and the practice of thirteen different states controlled by thirteen different legislatures, it was no wonder that the standards suggested by this Court to delineate "petty offenses" were vague: "punishable by commitment to jail, a workhouse or a house of correction"; "not indictable at common law"; "its moral quality is relatively inoffensive"; "malum prohibitum" as opposed to "malum in se"; "the practice of a community taken as a gauge of its social and ethical judgments". See *D.C. v. Colts*, 282 U.S. 63; *D.C. v. Clawans*, 300 U.S. 617 Cf. *U.S. v. Martinelli*, 240 F. Supp. 365 (1965).

Although this court attempted to rationalize its position by referring to Blackstone's English Common Law and State Practice the "petty offense" category was carved from the Sixth Amendment guarantee of trial by jury in *all* criminal prosecutions out of ex-

pediency; the necessity of federal courts to be able to dispose of certain minor crimes summarily, despite the Sixth Amendment's guarantee. See McCart, Trial by Jury (Chilton, page 45) (1964). See A. L. I. Model Penal Code, Tentative Draft No. 2, Comment following Section 1.05, p. 8, declaring that it is an inadmissable semantic manipulation to declare that any offense subject to a sentence of imprisonment is not a crime.

It is not Appellee's purpose to quarrel with this Court's "petty offenses" jurisprudence, or to champion the argument of Kaye, 26 University of Chicago Law Review, *supra*, that Congress is thereby allowed to evade the Sixth Amendment, by the judicial technique of exempting "petty offenses" from the definition of "crimes" and "all criminal prosecutions". Appellee's position is that the federal determination of what constitutes a petty crime, which is the off-spring of expediency and vagueness, should not bind the states in determining what is a petty crime for state purposes. Furthermore, as stated in *U.S. v. Krapf*, 180 F. Supp. 886, 890 (D.C. N.J. 1960)

> "Federal offenses and State offenses are by no means the same or clearly comparable. Because of the difference between the Federal jurisdiction and that of the State, many Federal offenses are quite incomparable to those of the State. It is therefore impossible to compare the nature of every State offense with the nature of every Federal offense".

Nevertheless, it is clear that simple battery as

defined in Louisiana Revised Statutes, Title 14, Section 35, is, even under the federal test, a crime of a minor nature, which would allow summary trial when provided by the state legislature.

(2) *English Common Law*

Simple battery as defined in Louisiana Revised Statute, 14:35, is not and was not an indictable offense and triable by jury at common law.

Appellant's argument that battery is not a minor offense, fails to distinguish between simple battery and aggravated battery. Appellant's citation of *State v. Stewart*, 89 N. Car. 563 (1883) to support his argument shows his confusion between simple battery and aggravated battery. In *State v. Stewart, supra*, the defendant assaulted the victim "above the left eye inflicting two wounds a half inch long and cutting to the bone". Because of the great bodily harm inflicted, this was an aggravated degree of assault (battery).

Appellant's confusion between simple battery and aggravated battery is again shown by his citation of *In re Robinson*, 20 D.C. 570 (Sup. Ct. D.C. 1892) to support his argument that simple battery is not a minor offense. In *Robinson, supra*, defendants were charged with assault and battery by "beating, wounding and ill treating" the victim, an aggravated degree of the crime. In discussing whether in England prior to the enactment of the statute known as 9 Geo. 4, a defendant was tried without a jury for assault and battery, the Court stated, "There was probably before that time a period when assaults *without battery or*

*wounding were tried by inferior tribunals without a jury* . . . where the party is charged with *not only an assault but with beating and wounding*, he is entitled to a trial by jury". 20 D.C. 571. (emphasis supplied). In this case the meaning of "assault and battery" is beating and wounding, an aggravated degree of the crime.

*Work v. State*, 2 Ohio St. 296, the third case cited in appellant's brief as supporting the view that battery prosecutions require jury trials, holds that jury trials cannot be dispensed with even for petty offenses. As such the *Work* case is contrary to *D.C. v. Clawans*, 300 U.S. 617.

Chitty was careful to point out in editing Blackstone's Commentary on Assault and Battery:

> "See 9 Geo. IV c. 31, § 24 to 29; prescribing the punishment of particular assaults, *and the summary proceeding before two justices in case of common assaults*". Emphasis supplied
>
> 2 Chitty's Blackstone Commentaries, 4th Book, page 166, Note 20.

In *State v. Maier*, 13 N.J. 235, 99 A. 2d 21, 29, the Court commented as follows upon the above statute:

> "The English practice of handling assaults and assaults and batteries from the simplest cases to the more grievous ones illustrated by the diary of Justice Hunt was codified for the first time in 9 Geo. 4, c. 31 (1828), dealing with various offenses against the person. Section 27 authorized summary proceedings before two justices of the peace for common assaults and batteries on pen-

alty of a fine not exceeding five pounds or two months imprisonment on default of such payment. Section 29 gave the justice of the peace the right not to adjudicate the controversy if 'from any other circumstance' it appeared to him to be 'a fit subject for prosecution by indictment'. There can be no doubt but that by 'common assaults and batteries' was meant what we in this State have called 'simple assaults and batteries', as distinguished from the high misdemeanors set forth in N.J.S. 2A:90-1, 2, 3, N.J.S.A., supra. England met the problem of the broad range of assaults and of assaults and batteries by leaving to the determination of the justice of the peace whether the suit should be a summary one without indictment and trial by jury or one that he should submit to the grand jury for indictment and if indictment were found, to be followed by trial by jury. New Jersey has met the same basic problem by treating as disorderly conduct the acts which heretofore would have constituted the crime of assault or assault and battery, leaving for indictment and trial by jury the special kinds of assault and battery comprehended within the three kinds of high misdemeanors just referred to, thus sparing the defendant in the cases treated as disorderly conduct from the personal disgrace of a criminal record and all of the social and business disadvantages which flow from a criminal conviction, including the loss of his right to continue to hold any public office he then occupied, N.J.S. 2A:135-9, N.J.S.A., or to qualify for a civil service position, R.S. 11:9-6, N.J.S.A., R.S 11:23-2, N.J.S.A., or the right to serve as a juror, N.J.S. 2A:69-1, N.J.S.A. *In any event, there can*

*be no doubt of the power of the justice of the peace at common law before 1776 to punish common or simple assaults and assaults and batteries summarily, without presentment or indictment and without trial by jury.*" (Emphasis supplied)

It has been pointed out that in Blackstone's England at Common Law no substantive distinction was made between different degrees of violence, there were no degrees of the offense of assault or of assault and battery which ranged from minor offenses as merely touching of the person to violence falling just short of manslaughter, and the crimes of "aggravated assault", "aggravated battery" and "simple battery" were unknown and had no technical or definite meaning. 1 Wharton's Criminal Law and Procedure (1957) Sec. 358, p. 714; 6 American Juris. 2d Verbo Assault and Battery, Sec. 1, 5; *State v. Maier, supra,* 99 A 2d at 24 (1952).

Nevertheless, Blackstone himself qualifies his discourse on assault and battery by the words "*where they are committed with any very atrocious design*". (Emphasis supplied.) 4 Blackstone Commentaries at 216-217; 2 Chitty's Blackstone Commentaries, 4th Book, p. 116; Erlich's Blackstone (Nourse 1959) p. 855.

Thus, although the technical term "simple battery" as distinguished from "aggravated battery" was unknown to Blackstone, he was in fact treating only aggravated assaults and batteries as indictable. Furthermore, in the same passage Blackstone categorized assaults and batteries as "inferior offenses or misde-

meanors". Blackstone's definition of a misdemeanor is as follows:

> "in common usage, the word crimes is made to denote such offenses as are of a deeper and more *atrocious* dye; while smaller faults and omissions of less consequence are comprised under the gentler name of 'misdemeanors' only". 4 Blackstone's Commentaries, p. 5.

In speaking of affrays, Blackstone again touches on the idea of grading the offense according to whether the circumstances were aggravated:

> "Affrays (from affraier, to terrify) are the fighting of two or more persons in some public place, to the terror of his majesty's subjects; for, if the fighting be in private, it is no affray but an assault(b). Affray may be suppressed by any private person present, who is justifiable in endeavouring to part the combatants, whatever consequence may ensue (c). But more "especially the constable, or other similar officer, however denominated, is bound to keep the peace; and to that purpose may break open doors to suppress an affray, or apprehend the affrayers; and may either carry them before a justice or imprison them by his own authority for a convenient space till the heat is over; and may then perhaps also make them find sureties for the peace (d). The punishment of common affrays is by fine and imprisonment; the measure of which must be regulated by the circumstances of the case; for, where there is any material aggravation, the punishment proportionably increases". 4 Blackstone's Commentaries at 145; 2 Chitty's Blackstone Commentaries, 4th Book, page 107.

Thus according to Blackstone a person guilty of an affray (public brawling) which is a much more serious crime than "simple battery" could be deprived of his liberty by the constable on his own authority until he decided that "the heat was over"!

II Hawkins Pleas of the Crown 17 (7th Ed. 1795) cited by Appellant as authority for his statement that battery was an indictable offense is inapplicable as it deals with the private law of contracts, covenants, debts, etc. and discusses a conflict of jurisdiction in civil, not criminal cases.

II Hawkins, Pleas of the Crown, p. 77, paragraph XIII, Sec. 63 (1795) is contrary to Appellant's argument and reads as follows:

> "XIII. What authority justices of peace have in relation to inferior offenses.
>
> Sec. 63. It would be endless to enumerate all the offenses within their jurisdiction, concerning which there have been great numbers of statutes —they are empowered to hear and determine all trespasses, which is a word of a very general extent, and in a large sense not only *comprehends all inferior offenses, which are properly and directly against the peace, as assaults and batteries and such like*, but also all others which are so only by construction, as all breaches of the law in general are a said to be". (Emphasis supplied).

3 Bacon, A New Abridgement of the Law (4th ed. 1778), 292, states:

> "And therefore, it hath been held, that not only

assaults and batteries, but libels, barretry, and common night-walking, and haunting bawdy-houses and such like offences, which have a direct tendency to cause breaches of the peace, are cognizable by justices of the peace, as trespasses within the proper and natural meaning of the word . . ." 3 Bacon, A. New Abridgement of the Law (4th ed. 1778), 292 (Emphasis supplied)

The significance of the jurisdiction of the justice of the peace over all forms of trespass, including assault and battery, is explained in 2 Holdsworth, History of English Law 364 (1923), in which Holdsworth explains the dual nature of trespass, including assault and battery, as torts begun at the suit of the injured individual as well as actions criminal in nature. According to Holdsworth the growth of the misdemeanor arose from the penal nature of such actions when justices of the peace took over the smaller criminal business and trespasses as criminal actions were presented to them for trial. (In *U.S. v. Bishop*, 261 F. Supp. 969, the court stated that trespass was not *malum in se* and did not connote serious moral turpitude).

By way of explanation it should be stated that at common law offenses triable in justice of the peace courts were not entitled to jury trials and were designated as "summary". See 4 Blackstone Commentaries, 277-78; Blackstone's Commentaries (Bernard Gavit ed.) p. 869; Erlich's Blackstone (Nourse 1959) p. 888.

Sidney and Beatrice Webb, in their English Local Government, vol. 1, at 418-419 give an even more spe-

cific account of the work of justices of the peace outside of the quarter sessions:

> "Their criminal jurisdiction ranged from the smallest misdemeanor penalized by a shilling fine, such as the utterance of an oath or the commission of a trivial statutory nuisance, up to the grave offenses of incorrigible vagabondage, rick-burning, or the killing of game, for which severe corporal punishment, a long term "of imprisonment, or even in one case, seven years transportation could be inflicted. . . .
>
> "Yet there was no provision for any trial by jury or for the publicity of an open court. Even in prosecutions under such drastic penal statutes as those relating to vagrancy and the preservation of game, the 'Single Justice' or the 'Double Justice' heard the case whenever he chose, without necessarily admitting the public, or even the defendant's attorney; took whatever evidence he deemed necessary, and himself decided both law and fact."

In referring to the diary of William Hunt, a justice of the peace of the County of Wilts for the years 1743-1748, they state:

> "We see him doing something every two or three days, granting warrants and summonses, signing parish accounts, swearing persons to affidavits, issuing certificates and passes of one sort or another, disposing of petty cases of bastardy, *assault*, 'hedge-pulling' and nonpayment of wages . . ." Id., 389 (Emphasis supplied)

An examination of Hunt's Diary dealing with assault and battery reveals the following entries:

"31 Oct., 1744. Granted a warrant against Benjamin Lewis of Markett Lavington, for violently *assaulting* of Edward Ivey of the parish of Burbidge, sheriffs baylief, *complainant*. Upon hearing the evidence of William Bell and William Bishop was so clear against him that I committed him to the Bridewell at Devizes". (Emphasis supplied)

In England "bridewell" is a term applied to "a house of correction; loosely a jail or prison". Webster's New International Dictionary. Another example is:

"21 May, 1745. Granted a warrant *on the complaint* of Mary Draper of Easterton, for an *assault* upon her by Elizabeth Plank, Mary Draper, Sarah Draper, Mary Draper junior and Elizabeth Jarvis, all of Easterton; upon a hearing the said complaint their mittimus was made to the house of correction, but afterwards were released by consent of the parties, paying charges." (Emphasis supplied)

A "mittimus" in English criminal practice was "a precept in writing, issuing from a court or magistrate, directed to the sheriff or other officer commanding him to convey to the prison the person named therein, and to the jailer, commanding him to receive and safely keep such person until he should be delivered by due course of law." Black's Law Dictionary 1153.

In Coke's Third Institute (London 1797) Cap. 82, p. 177 we are told that malicious striking with any weapon, or the drawing of any weapon in a church or church yard, could be tried before "justices of the

peace in their sessions" and were subject to penalty of loss of an ear or branding.

Discussing summary jurisdiction of justice of the peace courts in England in the 16th, 17th and 18th centuries, legal commentators have pointed out that such courts were given power by Parliament to try many specific minor offenses, a comprehensive list of which is impossible, but swearing, drunkenness, vagrancy and assault are cited as examples. Radcliffe and Cross, The English Legal System (3d ed. 1953) pages 202-204, 348-349.

Under current English practise, a common assault (which is like Louisiana's "simple battery") is not indictable and is heard by a court of summary jurisdiction without a jury. If convicted, the offender may be sentenced to imprisonment at hard labor. Offenses against the Persons Act, 1861 (24 and 25 Vict. c. 100) See Vol. 9 Halsbury's Laws of England (Halshan's 2d 3d. 1933), Sec. 812, note (a). A person charged with common assault (which is like our "simple battery") does not have a right to an indictment, or to a trial by jury, but is tried by a court of summary jurisdiction. Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49) s. 17; see Vol. 9, Halsbury's Laws of England, Sec. 55, pp. 52-55; Radcliffe and Cross, The English Legal System, (3d ed. 1954) p. 349. In 1951 in England, 11,000 persons were found guilty of the non-indictable offense of assault without a jury. Radcliffe and Cross, op. cit. *supra*, p. 349.

It is incongruous to argue that England, the birth

place of common law, can try simple batteries (common assaults) summarily, but that Louisiana may not.

(3) *United States*

"The bulk of the daily business of the criminal justice system consists of offenses that are not major—of breaches of the peace, crimes of vice, petty thefts, *assaults arising from domestic or street-corner or barroom disputes.* These . . . are disposed of in much less formal and much less deliberate ways." (Emphasis supplied). The Challenge of Crime in a Free Society, A Report by the President's Commission on Law Enforcement And Administration of Justice, p. 7.

Generally throughout the United States simple battery has been treated as a minor offense. See *D.C. v. Clawans*, 300 U. S. at 662, 663, text at notes 2, 3, 4, 5 and 6.

Alabama's Constitution of 1867, Section 10, authorized the state legislature to dispense with a grand jury and authorize the prosecution by justices of the peace or other inferior courts of *assault, assault and battery*, along with affray, unlawful assembly, vagrancy, petit larceny, and other misdemeanors. I. Thorpe, American Charters, Constitutions and Organic Laws 1492-1908 (Washington Government Printing Office 1909) page 133.

Arkansas's Constitution of 1864, although providing in Section 11 for trial by jury in prosecutions by indictment or presentment, provided in Section 18 for the institution of assault and battery prosecutions by summons or warrant and trial thereof before jus-

tices of the peace. Arkansas's 1868 Constitution, Section 9, required presentment or indictment of a grand jury except "in cases of petit larceny, *assault, assault and battery*, affray, vagrancy, and such other *minor* cases as the general assembly shall make cognizable by justices of the peace". (Emphasis supplied). Although Section 6 of Arkansas's 1868 Constitution provided that "the right of trial by jury shall remain inviolate", and Section 8 provided that in all criminal prosecutions the accused shall enjoy the right to trial by an impartial jury, Section 20 of the same Constitution provided that "the jurisdiction of justices of the peace shall extend to all matters less than felony for final determination and judgment". I Thorpe, *op. cit. supra*, pp. 291, 302, 307, 320.

Delaware's Constitution of 1831, Section 15, authorized the state legislature to grant jurisdiction of *assaults and batteries* and other specified crimes of a minor nature (including violation of licensing laws and nuisances) to one or more justices of the peace, to be proceeded against without indictment and tried without a jury. Section 15 specifically excludes assaults and batteries from the Delaware Constitution's general provision for trial by jury. Section 30 of Delaware's Constitution of 1897 is to the same effect. I Thorpe *op. cit. supra*, p. 593, 618.

Massachusetts' Constitution of 1780, Section XII, while providing that no one shall be deprived of life, liberty or property but by judgment of his peers or the law of the land, limited trial by jury to those

crimes subject to "a capital or infamous punishment". 3 Thorpe, *op. cit supra*, p. 1891.

South Carolina's 1868 Constitution Section 22 gave justices of the peace original jurisdiction of assault and battery prosecutions. 6 Thorpe, *op. cit. supra*, p. 3294.

In *Lancaster v. State*, 90 Md. 211, 44 A. 1039 (C. A. Maryland 1899) the defendant was charged with simple assault, tried and found guilty by a justice of the peace without a jury, and sentenced to eighteen months imprisonment and $10.00 fine. The Maryland court held that under the provisions of the state constitution the legislature could confer summary jurisdiction on justices of the peace to try persons for assault and battery, stating the following:

> "There can be no question since the decisions of this court in the cases of *State v. Glenn*, 54 Md. 599, and *Danner v. State*, 89 Md. ....., 42 Atl. 965, *that the legislature can, under the provisions of the Constitution of this state, confer summary jurisdiction upon justices of the peace to try persons for assaults and batteries.* In the recent case of *Danner v. State*, 89 Md. ....., 42 Atl. 965, this court said, in passing on a similar statute, that it would seem to be clear that the general scope and purpose of the law was to confer jurisdiction on the magistrate to hear and finally determine only in *such minor offenses as were punishable by imprisonment in the jail or house of correction or by pecuniary fine*—" (Emphasis supplied).

In *People ex rel Murray v. Special Sessions Jus-*

*tices*, 74 N.Y. 406 (1878), it was held that one charged with assault and battery was not entitled to trial by jury under the state constitutional provision that trial by jury in cases in which it had been heretofore used should remain inviolate because assault and battery at the time of the adoption of the state constitution was a petty offense triable without a jury. The court stated the following:

> "Courts of Special Sessions have existed since 1744, and have been continued both under the Colonial and State government to the present time. No jury was permitted in these courts until 1824, when the Legislature provided for a jury of six to be selected from twelve to be drawn if demanded by the accused, and this is the law throughout the State at the present time except in the city of New York. There if an accused person elects to be tried before the Court of Special Sessions he is tried without a jury."

In *State v. Maier*, 13 N. J. 235, 99 A. 2d 21 (1953), a prosecution for assault and battery by spitting upon the face and body of the victim, in violation of New Jersey's Disorderly Persons Law, which defines a person who commits an assault and battery as a disorderly person, the state supreme court held that simple battery is a petty offense, neither indictable nor required to be tried by jury under the state constitutional provisions providing indictment and trial by jury in all criminal prosecutions. The penalty imposed by the Disorderly Persons Law on simple assault and battery was not more than one year's imprisonment in a county workhouse, penitentiary, or jail, or a fine

of $1,000, or both. In an exhaustive and learned opinion, Chief Justice Vanderbilt reviewed the summary jurisdiction of justices of the peace at common law and the growth of legislation enlarging such jurisdiction, pointing out that the problem was universal in the administration of justice.

> "In every jurisdiction, it is necessary to provide the machinery for the effective punishment in summary fashion of minor offenses and breaches of the peace that fall far short of being crimes which require formal treatment . . ." 199 A. 2d at 25.

The New Jersey Court concluded that justices of the peace at common law prior to and during the Eighteenth Century undoubtedly had power to punish common or simple assaults and batteries summarily without indictment and without trial by jury, and that since that time, the Eighteenth Century summary jurisdiction over many other petty offenses more serious in nature than simple battery has been inevitably expanding in response to the changing needs of modern society.

Appellant contends that disorderliness is a classic instance of a common law petty offense; yet New Jersey has classified simple battery as disorderliness, and its highest court, in *Maier, supra,* stated that "many of the offenses which have long been considered disorderly conduct . . . involve more serious conduct than does simple assault or simple assault and battery". 99 A. 2d at 34. See also *State v. Zucconi,* 93 N. J. Super. 80, 226 A. 2d 16, 19-20 (1967).

The American Law Institute in its Model Penal Code, Tentative Draft No. 13, Sec. 250.1 (1) defines disorderly conduct as follows:

> "(1) *Disorderly Conduct.* A person is guilty of disorderly conduct if, with purpose to cause public inconvenience, annoyance or alarm, or with knowledge that he is likely to cause public inconvenience, annoyance or alarm, he:
>
> "(a) *engages in fighting*, threatening, or violent or tumultuous behavior;
>
> "(b) makes unreasonable noise or course (indecent?) utterance, gesture, or display, or addresses abusive language to any person present; or
>
> "(c) otherwise creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.
>
> " 'Public' means affecting or likely to affect persons in a neighborhood, highway, school, hospital, prison or other institution, apartment house, office building, transport facility, shop, or other place to which the public or a substantial group has access. Disorderly conduct is a petty misdemeanor if the actor has the purpose to cause substantial harm or serious inconvenience, annoyance or alarm, or if he persists in disorderly conduct after reasonable warning or request to desist. Otherwise disorderly conduct is a violation." (Emphasis supplied)

Engaging in fighting, threatening or violent behavior designated as disorderly conduct by A. L. I. involves conduct of a similar nature as that involved in simple battery, and appellant admits that disorderly conduct is a "classic petty offense".

Congress itself considers simple battery a petty offense. U.S.C. 18, Section 113 (d) and (e) make assault by striking, beating, or wounding, as well as simple assault, petty offenses, in accordance with U.S. C. 18 Section 1.

That simple battery, as defined in La. R. S. 14:35 does not involve moral turpitude and is not *malum in se* is shown by the circumstances which except the same conduct which would constitute simple battery from the category of a crime. Thus the same act which would constitute simple battery if done with the consent of the victim, is not a crime (In aggravated battery, the victim's consent is no defense.) See R.S. 14:34 and 14:35. Thus, blows given in the course of rough horseplay or during an athletic contest do not constitute simple battery. Further, a parent may correct a child and a schoolteacher may use reasonable corporal punishment in the correction of his pupils without being guilty of simple battery. See Clark and Marshall Crimes, p. 315; Wharton's Criminal Law and Procedure (1957) p. 694; Archbold's Criminal Pleading, (1943) p. 931.

The kind of actions which can constitute simple battery illustrate its minor nature: A blow inflicted as a joke without the victim's consent is a battery, as neither malice nor anger is necessary to a battery in some jurisdictions. Merely touching another's clothing or his chin without his consent is a battery. In some states hazing by social clubs is a battery. Wharton *op.cit. supra*, pp. 685-687. And in *Moreland v. State*, 125 Ark. 24, 188 S. W. 1 (1916), it was held that a

defendant who took a young woman's wrist and attempted to kiss her without her consent had committed a battery.

From the type of offenses which have been held to constitute simple battery, it is clear that the moral quality of the crime is relatively inoffensive and that it is not *malum in se*.

(4) *Louisiana*

Unique among her sister states, Louisiana under the dominion of France and Spain until the early nineteenth Century, inherited a continental legal system derived from Rome through the systems of France and Spain. See Elliott & McDonald, Western Political Heritage (Prentice-Hall 1949) p. 247; Wormser, The Law (Simon and Schuster 1949) p. 404; 8 The History of North America (Guy C. Lee, ed. 1904) pp. 239-253. Under this Romanesque or civil law system, bench trial rather than jury trial was the mode of determining facts. See Freed, Aspects of French Criminal Procedure, 17 La. L. Rev. 730 (1957); Pugh, Administration of Criminal Justice in France, 23 La. L. Rev. 1 (1962); McCart, Trial by Jury (Chilton 1964) p. 14; Wigmore, Panorama of the World's Legal Systems (Library Ed.) pp. 408-409.

As a territory for nine years in the early nineteenth century, Louisiana was under the exclusive jurisdiction of the United States, and its court procedure came directly under the operation of the Sixth Amendment. *Webster v. Reid*, 11 Howard 437, 459;

*Spies v. Illinois*, 123 U.S. at 169; *Thompson v. Utah*, 170 U. S. 343.

The people of Louisiana were dissatisfied with the territorial law affecting them. Among other things, they objected to jury trials because having been instilled by their French heritage with respect for superior training, they were at a loss to understand how a jury of unschooled men could dispense justice. McGinty, A History of Louisiana (Exposition Press 1949) pp. 106-107.

The first territorial legislature of Louisiana passed Louisiana's first general criminal statute called the "Crimes Act of 1805", providing in Section 33 that the crimes and misdemeanors therein specified and method of criminal procedure should be construed according to the English common law, unless otherwise provided. This Act (Act 50 of 1805) provided punishment of long prison terms at hard labor for serious crimes such as murder, arson, burglary, rape, manslaughter, maiming, and riot. Battery was "low man on the totem pole" and treated as a minor misdemeanor punishable by a fine or imprisonment or both at the discretion of the judge.

Louisiana Act 50 of 1805 was typical of that described in *Schick v. U. S.*, 195 U. S. 65 as follows:

> "In some states, in the same act are gatherned all the various offenses against the person, ranging from simple assault to murder; and imposing punishment from a mere fine to death."

The native Louisiana bar looked upon the Crimes

Act of 1805 with disfavor; they did not want the common law, a system with which they were unfamiliar, introduced into Louisiana to replace the civil law system. Therefore, with statehood imminent, the 1812 Constitutional Convention adopted the provision, still in existence in Louisiana organic law today, prohibiting the legislature from adopting a system or code of laws by general reference thereto. See Marr, The Necessity for a Criminal Code in Louisiana, 4 Tulane Law Rev. 18 (1929).

Since that time, there have been no so-called common-law crimes in Louisiana, nothing being a crime which is not made so by express statute. *State v. Bischoff*, 146 La. 748, 84 So. 41 (1920); *State v. Robinson*, 78 So. 933 (1918).

Subsequently, Louisiana legislatures passed numerous statutes penalizing conduct constituting battery wherein only the aggravated batteries were punishable as felonies with long imprisonment at hard labor, and conduct constituting simple battery as defined in R.S. 14:35 was consistently treated as a misdemeanor, punishable with fine or imprisonment in the parish jail, or both. Thus, assault with intent to murder (Act 43 of 1890), wounding with intent to kill (Act 44 of 1890), biting or maiming (Act 95 of 1898), putting out eyes (Revised Statutes 1870, Sec. 798), scalding or throwing acid on a person (Act 116 of 1912) were all felonies. On the other hand conduct constituting simple battery was punishable as a misdemeanor (Revised Statutes 1870, Sec. 796, 797; Act 107 of 1902).

The distinction between aggravated battery as a serious crime and simple battery as a misdemeanor was also recognized by Edward Livingstone in his proposed criminal code for Louisiana. See, *Complete Works of Edward Livingston on Criminal Jurisprudence*, Title XIX, Chapter 1, Section I, Article 406, which states that a "battery . . . may be a misdemeanor or a crime, according to the measure of violence or the intent with which it is offered."

The Louisiana Supreme Court has also recognized that a battery may include such trifling conduct as touching or laying hold of another person or his clothes. *State v. Robertson*, 48 La. Ann. 1067, 20 So. 296 (1896); *State v. Foster*, 156 La. 889, 101 So. 255 (1924).

With this background, the Louisiana Criminal Code of 1942 (now Title 14 of the Louisiana Revised Statutes of 1950) was enacted, eliminating the various assault and battery statutes mentioned above and distinguishing between aggravated battery and simple battery (Cf. R.S. 14:34 and R.S. 14:35) according to the seriousness of the prohibited conduct and the likelihood of serious bodily injury. The key to the difference is the means used to commit the act and the manner in which it is used. Thus, the use of a dangerous weapon as defined in R.S. 14:2 in a manner *calculated or likely to produce death or great bodily harm* distinguishes aggravated battery, a felony punishable in the penitentiary, (R.S. 14:34) from simple battery, a misdemeanor punishable in the parish jail (R.S. 14:-35).

Simple battery as defined in R.S. 14:35 is the use of force or violence on another's person without his consent, committed *without* the use of a dangerous weapon. Battery involves general, not specific, criminal intent. Therefore, an intent to injure is not a necessary element of simple battery. It is only necessary that the act constituting the simple battery be voluntary on the part of the accused and not consented to on the part of the victim. See, *In re Glassberg*, 230 La. 396, 88 So.2d 707 (1956) (although dealing with aggravated battery, the case enunciates principles concerning general intent which applies to simple battery as well). See, also, Bennett, The Louisiana Criminal Code—a comparison of prior Louisiana Criminal Law, 5 La. Law Rev. 6 (1942).

After tracing the treatment of assault and battery in Louisiana from the Crimes Act of 1805 to the present, we see that historically, in Louisiana, the conduct constituting simple battery has never been considered *malum in se* or as importing serious immorality. Louisiana follows other jurisdictions in providing that the same conduct constituting simple battery is not a crime if the victim has consented. In Louisiana, a conviction of simple battery, a misdemeanor, carries with it no civil disabilities. See, Opinions of the Attorney General, State of Louisiana 1928-1930, p. 632.

By way of contrast, aggravated battery is *malum in se* in Louisiana and the victim's consent is no defense to a prosecution therefor. Because it is a felony, a conviction of aggravated battery carries with it serious civil disabilities: disqualification as a voter or

office holder (La. Const. of 1921, Art. 8, Sec. 6); disqualification as an executor or administrator of an estate or as tutor of a minor (La. Code of Civil Procedure Arts. 3097, 4231); disqualification to hold a liquor license (R.S. 26:79); grounds for immediate divorce (La. Revised Civil Code, Art. 139).

The imposition of such disabilities on convicted felons but not those convicted of misdemeanors shows Louisiana's judgment that those crimes which it designates as felonies, like aggravated battery, import serious moral turpitude, while those which it designates as misdemeanors, like simple battery, do not.

It is therefore submitted that the nature of "simple battery" as defined in Louisiana Revised Statutes 14:35 qualifies it as a "petty offense" under Sixth Amendment federal standards. In view of its nature as a petty offense, in view of the two months' actually imposed on appellant, and in view of this Court's holding in *Cheff v. Schnackenberg*, 384 U.S. 373 that an actual sentence of six months qualifies an offense as a petty one, appellant's trial without a jury was permissible even if the Sixth Amendment jury trial provision applied directly to the States. Consequently, this Court need not reach the constitutional question of applicability to the States of the Sixth Amendment jury trial guarantee.

In the alternative, it is submitted that the Sixth Amendment federal jury trial standard does not apply to the States, the right to a jury trial being determinable only by reference to the due process clause of

the Fourteenth Amendment, and as such required only if essential to a fair trial.

## B. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT INCORPORATE THE BILL OF RIGHTS; A RIGHT SECURED BY THE BILL OF RIGHTS IS BINDING ON THE STATES ONLY IF IT IS INDISPENSABLE TO LIBERTY AND JUSTICE.

On numerous occasions for well over a century, Appellant's theory that the due process clause of the Fourteenth Amendment incorporated the entire Bill of Rights has been presented to and rejected by this Court.

In 1833 this Court determined that the first eight amendments were directed at the Federal Government. *Barrow v. Mayor of Baltimore*, 7 Pet. 243. Chief Justice Marshall, a staunch Federalist, stated "In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments. . . . These amendments contain no expression indicating an intention to apply them to the state governments. This Court cannot so apply them."

Any student of *The Federalist* knows that Madison, Jay, and Hamilton spent a good deal of time and space attempting to allay the fears of those who did not consider that the proposed Constitution sufficient-

ly protected their liberty against encroachment by the Federal Government.

"In the first place it is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any. The subordinate governments, which can extend their care to all those other objects which can be separately provided for, will retain their due authority and activity. . . ."

"It may safely be received as an axiom in our political system, that the *State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority. . . .*" (Emphasis supplied)

"The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs; concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."

". . . the powers proposed to be lodged in the federal government are as little formidable to those

reserved to the individual States, as they are indispensably necessary to accomplish the purposes of the Union; and that all those alarms which have been sounded, of a meditated and consequential annihilation of the State governments, must, on the most favorable interpretation, be ascribed to the chimerical fears of the authors of them."

The Federalist, (Modern Library, Random House) Nos. 14, page 82; 28, page 174; 45, page 303; 46, page 312.

In 1791, despite Hamilton's argument that bills of right are stipulations between kings and their subjects and have no application to a constitution founded upon the power of the people, (The Federalist, No. 84), the very first Congress under Madison's leadership, adopted the first ten amendments to guard the individual against the omnipotent power of the federal government.

It is significant for the disposition of the case at bar that Madison, who feared the power of the legislative branch of government[1] attempted to get Congress

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[1] ". . . The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetous vortex." ". . . they seem never for a moment to have turned their eyes from the danger to liberty from the *overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority* . . . In a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire. In a de-

to pass, along with the ten amendments, Proposition No. XIV which required the states to provide trial by jury. Proposition XIV was rejected by Congress at the same time that it accepted the first ten amendments. See Brennen, Bill of Rights and the States, 36 N.Y. University, L.Rev. 773. This was a judgment by Congress that trial by jury in state court is not indispensable to liberty and justice.

Nevertheless, the adoption of the Fourteenth Amendment, after the Civil War, gave new grist for the mills of those who would place all of the same limitations on local state government as are placed

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mocracy, where a multitude of people exercise in person the legislative functions, and are continually exposed by their incapacity for regular deliberation and concerted measures, to the ambitious intrigues of their executive magistrates, tyranny may well be apprehended, on some favorable emergency, to start up in the same quarter. But in a representative republic, where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.

The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the coordinate departments." The Federalist, No. 48.

on the distant all powerful federal government by the Bill of Rights.

In 1873 this Court again answered the argument in a manner favorable to maintaining state power unfettered by federal standards. *Slaughterhouse Cases*, 83 U.S. 36.

The Court held that the privileges and immunities of National citizenship are different from those of state citizenship and that the privileges and immunities clause of the Fourteenth Amendment does not make the privileges and immunities of national citizenship, as set forth in the Bill of Rights, applicable to state citizenship; nor does the due process clause of the Fourteenth Amendment incorporate the entire Bill of Rights as fundamental to life, liberty, or property. With reference to the "privileges and immunities" argument, the Court stated:

> "... Was it the purpose of the Fourteenth Amendment, by the simple declaration that no state should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights, which we have mentioned, from the state to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the states?
>
> "All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of

> Congress whenever in its discretion any of them are supposed to be abridged by state legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the states, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects . . ." 176 U.S. at 589.

The holding of the *Slaughterhouse Cases, supra,* as to the privileges and immunities clause of the Fourteenth Amendment has never been changed and is still the rule of law. However, as to the due process clause, certain rights enumerated in the Bill of Rights have been held in subsequent decisions, hereinafter discussed, to be fundamental to liberty and consequently applicable to the States. See *Smith* (President-elect of the A.B.A., 1962), *What has Happened to the Tenth Amendment,* 10 Louisiana Bar Journal 21, 29-32 (1962); *Beth, The Slaughterhouse Cases Revisited,* 23 La. Law Review, 487 (1963) wherein the author states at pages 496 and 500:

> ". . . The Slaughter-House Cases have left a legacy which is of great importance, as the dispute between the majority and the dissenters in *Adamson v. California* illustrates. For in Adamson Justice Black was arguing, in substance, that Miller, the organ of the Court, had been wrong (he was writing that non-existent 1873 concurring opinion) and that the Slaughter-House precedent should be disregarded. Frankfurter, on the contrary, stood squarely behind what had become the "traditional" interpretation of the fourteenth amendment. For it has always been assumed by later Court majorities that Miller's construction

of the citizenship clause was correct. Consequently, it is still true today that the rights of persons as state citizens are in some respects different from their rights as national citizens. This is conspicuously true of the right to obtain due process from police and courts; the rule of *Palko v. Connecticut*, elucidated by Justice Cardozo to justify the Court's refusal to apply the double jeopardy rule to the states, is based on this distinction, and it is this that Frankfurter was defending. In this respect, then, Miller was successful in imposing his view of the fourteenth amendment on the future."

". . . Although the Court has in later times given the fourteenth amendment much more meaning than Miller would have wished, it has never gone all the way. By maintaining Miller's basic distinction between state and national citizenship it has given itself the power to choose which individual rights are fundamental enough to claim legitimate cover of the amendment, and which are not. This is the aspect of the Slaughter-House legacy which the dissenters in the Adamson case tried unsuccessfully to reverse."

In 1880 in *Missouri v. Lewis*, 101 U.S. 22, this Court affirmed its position that the Fourteenth Amendment does not compel uniformity in state procedure and does not prevent any state from adopting any system of laws or judicature that it sees fit for all or part of its territory.

"The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great di-

versities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several states without violating the equality clause in the 14th Amendment, there is no solid reason why there may not be such diversities in different parts of the same State. A uniformity which is not essential as regards different States cannot be essential as regards different parts of a State, provided that in each and all there is no infraction of the constitutional provision. Diversities which are allowable in different States are allowable in different parts of the same State. Where part of a State is thickly settled, and another part has but a few inhabitants, it may be desirable to have different systems of judicature for the two portions; trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the State Government if it could not, in its discretion, provide for these various exigencies.

"If a Mexican State should be acquired by treaty and added to an adjoining State or part of a State, in the United States, and the two should be erected into a new State, it cannot be doubted that such new State might allow the Mexican laws and judicature to continue unchanged in the one portion, and the common law and its corresponding judicature in the other portion. Such an arrangement would not be prohibited by any

fair construction of the 14th Amendment." 101 U.S. at 33.

In 1875 in *Walker v. Sauvinet*, 92 U.S. 90, this court held that trial by jury in suits at common law is not a privilege or immunity belonging to a person as a citizen of the United States and is therefore not protected by the Fourteenth Amendment. The Court pointed out, citing *Edward v. Elliott*, 21 Wall 532, that it has often been held that the seventh amendment relates only to Federal Courts and that the states are left to regulate trials in their own courts in their own way. "A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. *Murray's Lessee v. Hoboken Land and Import Co.*, 181 How 272, 280. Due process of law is process due according to the law of the land. *This process in the States is regulated by the law of the States*" (Emphasis supplied). 92 U.S. at 92-93. See also *Kennard v. La.*, 92 U.S. 480, 483 (1875), setting forth the requirements of procedural due process.[2]

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[2] ". . . ample provision has been made for the trial of the contestation before a court of competent jurisdiction; for bringing the party against whom the proceeding is had before the court, and notifying him of the case he is required to meet; for giving him an opportunity to be heard in his defense; for the deliberation and judgment of the court; for an appeal from this judgment to the highest court of the State, and for hearing and judgment there. A mere statement

In 1883, in *Hurtado v. California*, 110 U.S. 516, this Court held that despite the Fifth Amendment, prosecutions by a State may be instituted by information at the instance of a public officer, rather than by the indictment of a grand jury. In the Hurtado case the accused maintained that the phrase "due process of law" was equivalent to "law of the land", as found in the 29th chapter of *Magna Charta;* and that by immemorial usage it had acquired a fixed and technical meaning and necessarily included the identical institutions which had crossed the Atlantic with the colonists and were transplanted from England and established in the fundamental laws of this country. In a thorough and scholarly opinion the Court discussed the common law, the institutes of Lord Coke and the *Magna Charta,* stating that the interpretation usually put upon Lord Coke's commentary of chapter 29 of the *Magna Charta* (2 INST. 46) was too large; that the phrase, "*Nisi per legale judicium parium suorum vel per legem terrae,*" meant but by the judgment of his peers, or by some other legal process or proceeding adapted by law to the nature of the case (citing Reeve, 2 History of Eng. Law, 43); that "due process

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of the facts carries with it a complete answer to all the constitutional objections urged against the validity of the Act. The remedy provided was certainly speedy; but it could only be enforced by means of orderly proceedings in a court of competent jurisdiction in accordance with rules and forms established for the protection of the rights of the parties. In this particular case, the party complaining not only had the right to be heard, but he was in fact heard, both in the court in which the proceedings were originally instituted and, upon his appeal, in the highest court of the state."

of law" means law in its regular course of administration through courts of justice (citing, Kent, 2 Com., 13); that the words "*nisi per legale judicium parium*" had no reference to a jury but applied only to the *pares regni* who were the constitutional judges in the Court of Exchequer and *coram rege* (citing Bac. Abr. Juries, 7th Ed. Lond., n. Reeve, H. L. 41); that the accusation of the primitive grand jury was practically equivalent to a conviction, subject to a chance of a favorable termination of the ordeal by water; and that it was best not to go too far back into antiquity for the best securities of our liberties. Pointing out that it made more sense that liberty was preserved and developed by a progressive growth and wise adaptation to new circumstances of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government, the Court stated the following:

> "The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many Nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that Code which survived the Roman Empire as the foundation of modern civilization in Europe, and

which has given us that fundamental maxim of distributive justice, *Suum cuique tribuere.* There is nothing in *Magna Charta,* rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mold and shape it into new and not less useful forms.

"The concessions of *Magna Charta* were wrung from the King as guaranties against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the commons by limiting the power of Parliament; so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary Acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land; for notwithstanding what was attributed to *Lord* Coke in *Bonham's. Case,* 8 Coke, 115, 118 *a,* the omnipotence of Parliament over the common law was absolute, even against common right and reason.

. . .

"Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the

> ancient customary English law, they must be held to guaranty not particular forms of procedure, but the very substance of individual rights to life, liberty and property." 110 U.S. at p. 237. Cf. 3 Churchill, A History of the English Speaking Peoples, the Age of Revolution, pp. 146-147 (Dodd Mead & Co. 1957)

In 1887, in *Spies v. Illinois*, 123 U.S. 131, this Court once again answered the argument that the Fourteenth Amendment made all the restrictions of the Bill of Rights applicable to the State as well as the federal government, as follows:

> "That the first ten Articles of Amendment were not intended to limit the powers of the state government in respect to their own people, but to operate on the National Government alone was decided more than a half century ago, and that decision has been steadily adhered to since". (Citations omitted) 123 U.S. at 166.

In 1899 in *Brown v. New Jersey*, 175 U.S. 172, this Court held that a struck jury, in a State prosecution for murder, although unknown to the common law, was an impartial jury; that impartiality was all that due process required and that defendant was not deprived of due process of law. The Court stated the following:

> "The first ten amendments to the Federal Constitution contain no restrictions on the powers of the State, but were intended to operate solely on Federal Government (citing cases). The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to

the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution (citing cases). The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated by only an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceeding." *Missouri v. Lewis*, 101 U.S. 22, 31.

"The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at common law. Subject to the limitations heretofore named it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary. For instance, while at common law an indictment by the grand jury was an essential preliminary to trial for felony, it is within the power of a State to abolish the grand jury entirely and proceed by information." *Hurtado v. California*, 110 U.S. 516

The Court then cites with approval, the definition of due process in the *Hurtado case, supra:*

"Any legal proceeding enforced by public authority whether sanctioned by age and custom or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice must be held to be due process of law"

The Court also approved the definition of due process in *Leeper v. Texas*, 139 U.S. 462, 468:

> "Law in the regular course of administration through courts of justice is due process and when secured by the law of the State the constitutional requirement is satisfied" 175 U.S. at 174.

In the same year, 1899, this Court decided *Maxwell v. Dow*, 176 U.S. 581, which was a state prosecution by information for robbery. The accused launched a two-pronged attack under the Fourteenth Amendment, urging (1) that indictment by a grand jury and trial by a twelve-man unanimous jury was a right of national citizenship under the Fifth and Sixth Amendments and by virtue of the privileges and immunities clause of the Fourteenth and could not be abridged by the State, and (2) that indictment by a grand jury and trial by a twelve man unanimous jury were essential to liberty under the due process clause of the Fourteenth. The Court disposed of the first contention on the authority of *The Slaughter-house Cases, supra*, holding that:

> "the privileges and immunities of citizens of the United States do not *necessarily* include all the rights protected by the first eight amendments to the Federal Constitution against the powers of the Federal Government". 176 U.S. at 598.

and that the provision for a grand or petit jury in a state criminal prosecution was neither included among the rights of national citizenship nor a fundamental right of state citizenship. In disposing of accused's second contention under the due process clause, the

Court held that trial by jury was not a fundamental right, following the *Hurdado case, supra.* See 176 U.S. at 602. "In our opinion", stated the court, "the right to be exempt from prosecution for an infamous crime, except upon a presentment by a grand jury, is of the same nature as the right to a trial by a petit jury of the number fixed by common law . . . Trial by jury has never been affirmed to be a necessary requisite of due process of law. In not one of the cases cited and commented upon in the *Hurtado* case is a trial by jury mentioned as a necessary part of such process . . . The state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. The legislation in question is not, in my opinion, open to either of these objections." 176 U.S. at 603, 605. Thus the majority opinion again rejected the theory that simply because a constitutional right exists limiting the federal government, it *necessarily* creates a limitation on the States. In order to be applicable to the states such a right must be determined to be essential to life, liberty, or property. The only dissent, by Mr. Justice Harlan, is pitched primarily on the privileges and immunities clause and is strikingly similar to the dissents in later case of *Adamson v. California*, 332 U.S. at 71. It was Mr. Justice Harlan's premise that the privileges and immunities clause of the Fourteenth Amendment encompassed all of the first ten amendments, that the court could not pick

and choose among them to determine which were fundamental and which were not under the due process clause, and that "there is no middle position." 176 U.S. at 616.

Consequently, in *Maxwell v. Dow, supra*, we find the identical arguments propounded and decided as are presented in the case at bar.

The rationale of the Court in *Maxwell v. Dow* is still valid today. The Court based its decision on a determination that a trial by a petit jury, like a presentment by a grand jury is not such a fundamental right that a fair trial is impossible without it. This is the same test used by this Court in later cases in determining whether a right is so fundamental and essential that a fair trial cannot be had without it. See *Washington v. Texas*, 388 U.S. at 17-18.

In 1903, in *Hawaii v. Mankiki*, 190 U.S. 197 (1903) this court based its decision upon the ground that indictment by grand jury and trial by petit jury were not fundamental in their nature but concerned merely a method of procedure, and that sixty years of a practice contrary to the Sixth Amendment in the Hawaiian Islands had been shown to be suited to the conditions of the islands as well as calculated to conserve the rights of its citizens.

In 1903, this Court decided *West v. Louisiana*, 194 U.S. 258, which involved a conviction for larceny in the Criminal District Court of Orleans Parish on April 4, 1902. Article 9 of the 1898 Constitution of Louisiana was in effect at the time of the subject

prosecution. Article 9 provides for a speedy public trial by an impartial jury except where the penalty was not necessarily imprisonment at hard labor or death; and further provided that the latter case should be tried by a court without a jury, or by a jury of less than twelve in number as provided elsewhere in the Constitution. Article 9 further provided the right of confrontation, and assistance of counsel and compulsory process. At a preliminary hearing before a committing magistrate, in the presence of Defendant and his counsel, a witness was produced, examined orally and cross-examined by Defendant's counsel. However, on the trial of the case, the witness being absent from the state, the District Attorney read the testimony of the witness. This procedure was objected to by the Defendant on the ground that it violated the Louisiana Criminal Act,[3] Article 9 of the Louisiana Constitution of 1898, and the Sixth and Fourteenth Amendments of the Federal Constitution. The question presented for decision by this Court was whether the admission of the deposition taken at the *preliminary* hearing deprived the Defendant of due process under the Fourteenth Amendment and of his right to be confronted by the witness against him. The Defendant's contention was that due process was violated because

[3]The Act of 1805 provided "All criminal offenses and misdemeanors shall be construed according to the common law of England and forms of indictment, method of trial, rules of evidence and all other proceedings in the prosecution of crimes, offenses and misdemeanors, changing what ought to be changed, shall be according to the common law, *unless otherwise provided.*" (Emphasis supplied)

at common law the right to read a deposition upon a defendant's trial did not exist if a witness was absent, but existed only if the witness was dead, insane or ill. This Court, answering the Defendant's argument, stated that in order to find due process lacking, it must find that the Court's refusal to exclude the deposition took away "a right of such an important and fundamental character as to deprive them of their liberty without due process of law". The Court further stated, 194 U.S. at 262-263:

> "The State of Louisiana had the right to alter the common law at any time, although it had heretofore adopted it with certain limitations . . . The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at common law . . ."
>
> "Coming to a decision of the question before us, we are of the opinion that no Federal right of the plaintiff in error was violated by admitting this deposition in evidence.
>
> "Its admission was but a slight extension of the rule of common law even as contended by counsel. The extension is not of such a fundamental character as to deprive the accused of due process of law. It is neither so unreasonable nor improper as to substantially affect the rights of an accused party or to fundamentally impair those general rights which are secured by the Fourteenth Amendment."

Once again it is seen that way back in 1903 this Court understood that the question of due process under the Fourteenth Amendment involved the test of

the deprivation of a fundamental right and that this test, as contended by Defendant in the case at bar, is not some new discovery made by this Court in its recent decisions.

In 1921, in *Ownbey v. Morgan*, 256 U.S. 94, this court stated:

> "The due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall. It restrains state action, whether legislative, executive, or judicial, within bounds that are consistent with the fundamentals of individual liberty and private property, including the right to be heard where liberty or property is at stake in judicial proceedings."

In 1927, Justice Holmes, denying an application for Habeas Corpus in the Sacco and VanZetti cases was reported in the New York Times, August 21, 1927 as stating:

> "The essential fact of record that is relied upon is that the question of Judge Thayer's prejudice, raised, and it is said, discovered only after the trial and verdict, was left to Judge Thayer and not to another judge. But, as I put it to counsel, *if the Constitution of Massachusetts had provided that a trial before a single judge should be final without appeal, it would have been consistent with the Constitution of the United States.*" (Emphasis supplied)

In 1928 in *Dugan v. Ohio*, 277 U.S. 61, this Court

affirmed a conviction for violation of liquor laws. The Defendant was tried by the Mayor of an Ohio City without a jury.

In 1930 in *Coler v. Corn Exchange Bank*, 250 N.Y. 136, affirmed 280 U.S. 218 the Court stated the following:

> "The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike."

In 1932 in *Powell v. Alabama*, 287 U.S. 45, this Court discussing procedural due process under the Fourteenth Amendment, stated as follows:

> "One test which has been applied to determine whether due process of law has been accorded in given instances is to ascertain what were the settled usages and modes of proceeding under the common and statute law of England before the Declaration of Independence, *subject, however, to the qualification that they be shown not to have been unsuited to the civil and political conditions of our ancestors by having been followed in this country after it became a nation . . .*" (Emphasis supplied)

> "The fact that the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'. (*Hebert v. Louisiana*, 272 U.S. 312, 316), is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due

process clause of the Fourteenth Amendment, *although it be specifically dealt with in another part of the Federal Constitution.*" (Emphasis supplied)

"It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law . . .

"What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel . . ."

In 1934 in *Snyder v. Massachusetts*, 291 U.S. 97, the Court affirmed a conviction for murder, although the accused had not been permitted to accompany the jury to view the site of the crime. As stated by Justice Cardozo:

"Consistent with that amendment (the Fourteenth) trial by jury may be abolished". 291 U.S. at 105.

The rationale of the decision was whether the right contended for has a substantial relation to the defendant's right to defend himself against the charge.

In 1937 in *Palko v. Connecticut*, 302 U.S. 319, Mr. Justice Cardozo stated the following for this Court:

We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.

The Fifth Amendment provides, among other things, that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. This court has held that in prosecutions by a state, presentment or indictment by a grand jury may give way to informations at the instance of a public officer. *Hurtado v. California*, 110 U.S. 516; *Gaines v. Washington*, 277 U.S. 81, 86 . . . The Sixth Amendment calls for a jury trial in criminal cases and the Seventh for a jury trial in civil cases at common law where the value in controversy shall exceed twenty dollars. This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether. *Walker v. Sauvinet*, 92 U.S. 90; *Maxwell v. Dow*, 176 U.S. 581; *New York Central R. Co. v. White*, 243 U.S. 188, 208; *Wagner Electric Co. v. Lyndon*, 262 U.S. 226, 232 . . .

On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress. . . .

The line of division may seem to be waver-

ing and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. *The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, supra,* p. 105; *Brown v. Mississippi, supra,* p. 285; *Hebert v. Louisiana,* 272 U.S. 312, 316. *Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. . . .*

*We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the Federal Bill of Rights and brought within the Fourteenth Amendment by a process of absorption.* These in their origin were effective against the federal government alone. *If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. Twining v. New Jersey, supra,* p. 99. This is true, for illustration, of *freedom of thought and speech.* Of that freedom one may say that it *is the matrix, the indispensable condition, of nearly every other form of freedom.* With rare aberations a pervasive recognition of that truth can be traced in our

history, political and legal. So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action. The extension became, indeed, a logical imperative when once the notion was abandoned, as long ago it was that liberty is something more than exemption from physical restraint, and that even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary, may be overridden by the courts. Cf. *Near v. Minnesota, supra; De Jonge v. Oregon, supra.* Fundamental too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial. *Scott v. McNeal*, 154 U.S. 34; *Blackmer v. United States*, 284 U.S. 421. The hearing, moreover, must be a real one, not a sham or a pretense. *Moore v. Dempsey*, 261 U.S. 86; *Mooney v. Holohan*, 294 U.S. 103. For that reason, ignorant defendants in a capital case were held to have been condemned unlawfully when in truth, though not in form, they were refused the aid of counsel. *Powell v. Alabama, supra*, pp. 67, 68. *The decision did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a federal court. The decision turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing.*

Our survey of the cases serves, we think, to justify the statement that the dividing line be-

tween them, if not unfaltering throughout its course, has been true for the most part to a unifying principle. On which side of the line the case made out by the appellant has appropriate location must be the next inquiry and the final one. Is that kind of double jeopardy to which the statute has subjected him *a hardship so acute and shocking that our polity will not endure it? Does it violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"? Hebert v. Louisiana, supra.* The answer surely must be "no." *What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider.* We deal with the statute before us and no other. . . ." (Emphasis Supplied)

From the above quotations it is perfectly clear that the test used by this Court in the Palko decision for determining procedural due process is identical with that used by this Court in its most recent decisions: those privileges enunciated in the Bill of Rights which have been applied to the States, are so applied only because neither liberty nor justice would exist if they were sacrificed and, with reference to a criminal prosecution, such rights were essential to a fair hearing. Therefore, the rationale of Justice Cardozo's Palko decision is very much alive today.

Since the Palko decision was decided in 1937, under the due process clause, there has been "a developing distinction between fundamental and non-fundamental rights which could be adapted to the conditions

of time and place as Cardozo attempted to do in his Palko opinion." Beth, The Slaughterhouse Cases Revisited, 23 La. Law Review, 487, 503 (1963). See *The Adamson Case, A Study in Constitutional Technique*, 58 Yale L. J. 268, (1949) as supporting the *Palko* doctrine of "those guarantees implicit in the concept of ordered liberty" and the due process clause as a flexible concept of fundamental fairness.

It has long been established by this Court that a right to a fair trial is protected by the due process clause of the Fourteenth Amendment. *Moore v. Dempey*, 261 U. S. 86, 91; *Chambers v. Florida*, 309 U.S. 227, 238; *Buchalter v. New York*, 319 U. S. 427.

The guarantees of the Sixth Amendment which have been applied to the States in this Court's more recent decisions have been applied not because they are found in the Sixth Amendment, but because they are essential to a fair trial, and a fair trial is protected by the due process clause of the Fourteenth. It is true that in some of this Court's more recent decisions, loose language was used which could be interpreted to mean that the Sixth Amendment applies directly and mechanically to the States through the Fourteenth, but such language is just a gloss through which the primary principle decided by the case shines; the right decreed to be binding on the States is implicit in due process because a fair trial would be impossible without it.

Thus, in *Gideon v. Wainwright*, 372 U. S. 342, this

Court held that a fair trial, at least in a felony prosecution, necessarily includes the right to be represented by counsel, and that an indigent defendant must be afforded counsel by the state.

> "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him . . .
>
> 'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel'." 372 U.S. at 344.

In *In re Oliver*, 333 U.S. 257 (1948), which involved the Michigan one man grand jury-judge, this Court determined that a fair trial was impossible if held in secret and without reasonable notice, opportunity to cross-examine opposing witnesses and opportunity to consult counsel.[4]

In *Pointer v. State of Texas*, 380 U. S. 400 (1965), the use of a deposition taken at a preliminary hearing at which petitioner was not afforded the right of cross examination was held to be violative of due pro-

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[4]Perhaps the following remark of Mr. Justice Rutledge, one of the four dissenters in *Adamson v. California*, 332 U.S. 46, gives insight into the thinking of those who would apply all of the Bill of Rights to the States: "It was good enough for our fathers. I think it should be good enough for this Court and the States." Dissenting opinion of Rutledge, J., *In Re Oliver*, 333 U.S. at 282.

cess because the opportunity of cross-examination of opposing witnesses is essential to a fair trial[5].

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[5]Inasmuch as Justice Black, the organ of the Court, is committed to the proposition that the Fourteenth Amendment's Due Process Clause incorporates all of the Bill of Rights, it is not surprising to find dicta in the opinion indicating that the Sixth Amendment applies directly to the States. See Justices Harlan's and Stewart's concurring opinions, 380 U.S. at 408-410. See Justice Black's dissenting opinions in *Adamson v. California*, 332 U.S. at 71-72; Cf. *Green v. U.S.* 356 U.S. 165 at 193.

Let us examine the claim set forth in Justice Black's dissent in the Adamson case that it was the intent of Congress to include the entire Bill of Rights in the Fourteenth Amendment, because Congressman John Bingham was responsible for its form and intended that the Bill of Rights be made binding on the States. It has been pointed out elsewhere than in Justice Black's dissent, that Bingham was one of the "Black Republicans" whose desire to wreck vengeance on the defeated South, motivated him rather than any desire to promote personal liberty. See Graham, *The Conspiracy Theory of the Fourteenth Amendment*, 47 Yale L. J. 371, 392 (1938). It has also been stated that Bingham, like all good abolitionists, distrusted the Supreme Court and regarded the Fourteenth Amendment as a weapon for legislative rather than judicial action against the States; that, as a railroad lawyer, he was a strong proponent of economic laissez-faire and sympathetic to the view of due process giving the Supreme Court power to interfere with state economic regulation (contrary to the views held by Justice Black); and that there is nothing in what Bingham or anyone else said to suggest that the Fourteenth Amendment was intended exclusively as a shorthand reference to the Bill of Rights. See *The Adamson Case: A Study in Constitutional Technique*, 58 Yale L. J. 268 (1949).

But even if the intent which Justice Black imputes to Bingham has a limited validity, it is illogical to equate the intent of one man with a project like a constitutional amendment which requires the acquiescence of Congress and the States.

"There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expression of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal . . . A major reason underlying the constitutional confrontation rule is to give a defendant charged with a crime an opportunity to cross-examine the witnesses against him . . . The case before us would be quite a different one had Phillips' statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine". 380 U.S. at 405, 406-407, Cf. *West v. Louisiana*, 194 U.S. 258.

In *Klopfer v. North Carolina*, 386 U.S. 213 (1966) the public prosecutor refused to bring petitioner's case to trial, and without any justification kept an indictment pending against him like the "Sword of Damocles". Pointing out that during this indefinite period, while petitioner was under indictment due to the arbitrary action of the prosecutor, he was subject to public scorn and his speech, associations and employment were curtailed, the court concluded that petitioner's liberty had been materially limited by the undue delay in trial and that since the prosecutor's action was unjustified, petitioner had

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See *Maxwell v. Dow, supra*, 176 U. S. at 601; *The Adamson Case, supra*, 58 Yale L. J. 268; Deutsch, *Civil Law Influences on the Development of Civil Liberties*, 12 Tulane Law Review 331 (1938).

thereby been deprived of his liberty without due process of law.

*Klopfer* merely reiterates the obvious principle that due process is denied when a defendant's rights are materially injured by the prosecutor's undue delay. The Court's discussion of the Sixth Amendment's right to a speedy trial was entirely unnecessary. See concurring opinion of Justice Harlan 87 Sup. Court at 994.

In a recent decision, *Washington v. Texas*, 388 U.S. 14 (1967), this Court determined that the right of an accused to have compulsory process for obtaining witnesses in his favor is so fundamental and essential to a fair trial that it is incorporated in the Due Process Clause.

> "The right to offer the testimony of witnesses and to compel their attendance if necessary is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process". 87 Supreme Court at 1923.

Clearly, the *Washington supra*, decision, is based on the essential nature of compulsory process in obtaining a fair trial, and the necessity of a fair trial which is implicit in the Due Process Clause of the Fourteenth Amendment. Again, the Court's discussion

of the Sixth Amendment right of compulsory process is unnecessary to the decision. See concurring opinion of Justice Harlan, 87 S. Ct. at 1925.

*Parker v. Gladden*, 385, U.S. 363 (1966) (statements by bailiffs overheard by jurors) and *Irwin v. Dowd*, 366 U.S. 717 (1961), (too much adverse publicity), cited by appellant as indicating that this Court has already held the jury trial right applicable to the States, were concerned with the impartiality of the jury and rights of confrontation and cross-examination and did not involve the question whether the Fourteenth Amendment requires a State to accord a jury trial in all criminal prosecutions. The question presented in both cases went to the *nature* of the jury trial which the Fourteenth Amendment commands when trial by jury is what the State has purported to accord. See *Turner v. Louisiana*, 379 U.S. 466 (1965). Indeed in *Irwin v. Dowd, supra*, quoted by appellant as support for his theory of the essential nature of jury trial, this Court was pointing out the *value* of jury trial, but at the same time acknowledging that it is *not required as an essential of due process* under the Fourteenth Amendment. *U.S. v. Maroney*, 355 F. 2d at 315, also cited by appellant, in the concurring opinion, points out that no right to trial by jury exists in state court by explicit ruling of the United States Supreme Court.

It does not follow that because some provisions of the Bill of Rights have been found essential to liberty

and justice; that all should be mechanically applied to the States.[6] Although some individual justices have

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[6]The Fourth, Fifth, and Eighth Amendment decisions cited by Appellant (*Ker v. California; Aguilar v. Texas; Mapp v. Ohio; Malloy v. Hogan;* and *Robinson v. California*) represent no more than extensions of the Palko doctrine of "ordered liberty" under the Fourteenth Amendment which prohibits state action which shocks the conscience. See Wolbrette, Detention for Questioning in Louisiana, 39 Tulane Law Review 69 (1964). The Fourth and Fifth Amendment case deal with the rights of privacy of persons or premises, including the right to resist unauthorized entry which has as its purpose the obtaining of information which can be used to effect a further deprivation of live, liberty, or property; the dignity of man which includes his right not to be convicted out of his own mouth; and the "deep-rooted feeling that the police must obey the law while enforcing the law". *Jackson v. Denno,* 378 U.S. at 386 (1964). "Four rationales have been said by the Supreme Court to underlie the exclusionary rule in search and seizure cases; providing the victim with an effective remedy; preventing the government from profiting by its own wrong; preserving the integrity of the court; and deterring the police from future misconduct". Orfield, Searches and Seizures in Federal Criminal Cases, 24 Louisiana Law Review 665 (1964). These reasons apply also to the exclusionary rule in self-incrimination cases. However, none of these rights or reasons has any bearing on the question whether trial by jury is fundamental to liberty and justice. The Fifth Amendment right to a grand jury indictment for an infamous crime, however, has always been treated as a right comparable to trial by jury. Blackstone points out that the grand jury in England served as a barrier between king and subject, assuring the subject against official persecution and groundless accusations. See 4 Blackstone Commentaries 303; Hale, Farewell to Grand Juries, 50 American Bar Association Journal 744 (1964); *Stirone v. U.S.,* 361 U.S. 212; *Green v. U.S.,* 356 U.S. 165. This Court has consistently held that indictment under the Fifth Amendment is not a due process right applicable to the states under the Fourteenth. See *Hurtado v. California,* 110 U.S. 516.

held such an opinion, a majority of this Court has never held that the Bill of Rights apply directly to the states through the Due Process Clause of the Fourteenth Amendment. This Court has never found a guarantee of the Bill of Rights applicable to the States without first determining that the particular guarantee is essential to liberty and justice. See Corwin, The Constitution and What it Means Today, (1958) p. 250; Cooley, Constitutional Limitations, p. 67.

> "If the Court should ever arrive at the point, either directly or by indirection, of declaring that the entire Bill of Rights is to be regarded as applicable to the States through the Fourteenth Amendment, the result would be a 'can of worms' of difficulties that would almost defy adequate solution. State cases without number could be reopened. Criminal cases where the convicted person had not been brought to trial by grand jury indictment would line up alongside civil cases where a jury trial has been denied. Under the present arrangement, conduct that 'shocks the conscience' is voided, but in other matters that lack a 'fundamental character' the states are left free. This freedom of the states also has the salutory effect of encouraging experimentation. Justice should not be static. Improvement and greater efficiency should always be sought if basic justice is to be preserved." Bartholomew, The Gitlow Doctrine Down to Date, 50 Am. Bar Assn. Journal 139, 141 (1964).

It might be argued that the wholesale application of the Bill of Rights provides certainty by standardizing this Court's protection of personal liberties, but

the result, as has been pointed out by legal commentators, would stifle reform in the administration of justice, imposing overly rigid and burdensome restrictions on state criminal procedure, and thus invalidating a large number of current state practices, including instituting prosecutions by information instead of indictment, the modification of the twelve man petit jury, and the practice of trying common law suits involving more than twenty dollars without a jury. See *The Adamson Case, supra*, 58 Yale L. J. 268 (1949); Note, 96 U. of Pa. L. Rev. 272 (1947)

The President's Commission on Law Enforcement and Administration of Justice in *The Challenge of Crime In A Free Society*, stated that criminal administration is primarily a state and local responsibility, and further stated the following:

> "The system of criminal justice America uses to deal with those crimes it cannot prevent and those criminals it cannot deter is not a monolithic, or even a consistent system. It was not designed or built in one piece at one time. Its philosophic core is that a person may be punished by the Government if, and only if, it has been proved by an impartial and deliberate process that he has violated a specific law. Around that core layer upon layer of institutions and procedures, some carefully constructed and some improvised, some inspired by principle and some by expediency, have accumulated. . . . The entire system represents an adaptation of the English common law to America's peculiar structure of government, which allows each local community to construct institutions that fill its special needs. Every vil-

lage, town, county, city, and State has its own criminal justice system, and there is a Federal one as well. All of them operate somewhat alike. No two of them operate precisely alike . . ."

The Federalist, No. 17, (Hamilton) also emphasizes that the administration of criminal justice belongs to our states:

"There is one transcendent advantage belonging to the province of the State governments . . . I mean the ordinary administration of criminal and civil justice."

The extended discussion hereinabove has been made necessary because of the gloss which has been placed on the fundamental meaning of the Fourteenth Amendment's due process clause by such gratuitous pronouncements as:

". . . we have increasingly looked to the specific guarantees of the Sixth Amendment to determine whether a state criminal trial was conducted with due process of law." *Washington v. Texas*, 388 U.S. at 18)

and

"the fact that right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that (it is) a fundamental right essential to a fair trial." (*Pointer v. Texas*, 380 U.S. at 404)

An examination of the cases hereinabove discussed shows the following:

(1) The view prevailing prior to the adoption of the Fourteenth Amendment was that the Bill of Rights was adopted as a restraint on

the federal government and applied exclusively to it.

(2) After the adoption of the Fourteenth Amendment, it has been uniformly held that the privileges and immunities clause does not make the entire Bill of Rights applicable to the States, but that the due process clause prohibits the States from abridging any right which is fundamental to liberty and justice.

(3) The extreme position of certain dissenting justices, that the first section of the Fourteenth Amendment necessarily incorporates all of the Bill of Rights has been rejected time and time again.

It is submitted that the due process clause does not necessarily or even presumptively include a right merely because it appears in the Bill of Rights. The test is whether the right is essential to liberty and justice, and, in the case at bar, whether the claimed right of jury trial is essential to a fair trial. This has been the rationale of this Court since the *Hurtado* and *Maxwell decisions, supra,* and it is the rationale of the latest decisions in this field.

Hopefully, the desire for uniformity throughout the nation in the administration of justice in spite of local differences that exist, and in spite of the long line of decisions denying the mechanical application of the entire Bill of Rights to the States, will not lead to the adoption of the extreme view repeatedly rejected since the Slaughterhouse Cases.

On the subject of the danger of compelled uni-

formity, one of the four dissenting justices in *Malloy v. Hogan*, 378 U.S. 1, 24 (1964), accused the majority of compelling uniformity between state and federal criminal law enforcement, thus unduly restricting the power of the states to deal with local crime and bringing this nation "closer to the monolithic society which our federalism rejects."

It is most respectfully submitted that while it might be argued that compelled uniformity makes for convenience and efficiency in the administration of justice, it is fatal to liberty, and foreign to the principles which constitute the fabric of our society.

C. THE DIRECT APPLICATION TO THE STATES OF THE SIXTH AMENDMENT JURY TRIAL RIGHT WOULD REQUIRE THE VERDICT OF A UNANIMOUS TWELVE MAN JURY FOR A CONVICTION IN STATE COURT.

In *American Publishing Company v. Fisher*, 166 U.S., 464 (1897) and in *Springville v. Thompson*, 166 U.S. 707 (1897) this court held that because the right to trial by jury in certain suits at common law is preserved by the Seventh Amendment, such a trial implies that there shall be a unanimous verdict of twelve jurors in all federal courts where a jury trial is held.

In *Thompson v. Utah*, 170 U.S. 343 (1897) this court held that Utah, being a territory at the time that the crime of which the defendant was accused was committed, its courts were under the exclusive jurisdiction of the United States, and the Sixth Amendment applied directly and required a unanimous

twelve man jury to convict. The court reasoned that the jury referred to in the original Constitution and the Sixth Amendment is a jury constituted as it was at common law of twelve persons requiring a unanimous verdict.

In *Patton v. United States*, 281 U.S. 276, 288 (1929) this court held that the Sixth Amendment trial by jury means a trial by jury as understood and applied at common law and includes the following essential elements: 1. All juries to consist of twelve men; 2. Trial to be in the presence and under the superintendence of the judge having power to instruct the jury as to the law and advise them in respect of the facts; 3. Verdict must be unanimous.

In *Andres v. United States*, 333 U. S. 740, 748 (1948) this court stated "Unanimity in jury verdicts is required when the Sixth and Seventh Amendments apply".

In *Singer v. United States*, 380 U. S. 24 (1965) this Court pointed out that *Thompson v. Utah*, *supra*, and *Schick v. United States*, 195 U. S. 65, have been construed together as establishing the rule that in all but petty offenses, conviction by a twelve man unanimous jury was compelled by the Sixth Amendment in federal prosecutions.

In *Singer v. United States*, *supra*, this Court further held that under the Sixth Amendment[7] there

[7] "We need not determine in this case whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that

is no federally recognized right to a criminal trial before a judge sitting alone, but that a defendant may waive his right to trial by jury provided that the prosecuting attorney and trial judge consent.[8] The Court in its opinion recognized that the states have adopted a variety of procedures relating to waiver of jury trials in state criminal cases, noting several states where waiver is a matter solely within the defendant's discretion. 380 U. S. at 36-37.

Therefore, if the rigid federal jury trial standards are fastened on the states under the Sixth Amendment, as they must be if the Sixth Amendment jury trial right is held to apply directly to the states, the following will result:

1. Convictions under state laws providing for less than twelve man juries and/or less than unanimous verdicts will be unconstitutional.

2. State determinations of what constitutes a petty state offense so as to be excepted from the Sixth Amendment requirement of conviction by a twelve man unanimous jury, will be subject to the federal definition of a petty crime. This would affect such crimes as reck-

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the Government's insistence on trial by jury would result in the denial to the defendant of an impartial trial . . . petitioner gave no reason for wanting to forego jury trial other than to save time". *Singer v. U.S. 380 U.S. at 37.* The Court is undoubtedly referring to due process under the Fifth Amendment.

[8]Rule 23 (a) Federal Rules of Criminal Procedure.

less or drunken driving, which in many state jurisdictions are considered not of a sufficiently serious nature to warrant trial by jury.[9]

The federal view is that reckless or drunken driving involves a crime of such a serious nature that trial by jury is required to convict one accused of such a crime in federal court. *District of Columbia v. Colts*, 282 U. S. 63 (1930).

3. State procedure for waiver of jury trial, which varies considerably from state to state, some states not allowing waiver of jury trial at all in capital cases (as in Louisiana) and other states allowing the defendant to waive jury trial without the state's consent, would be subject to the rigid procedure followed in federal court.

On the other hand, if the right to trial by jury is to be determined not with reference to the Sixth Amendment, but only with reference to whether it is a necessary element of a fair trial under the due process clause of the Fourteenth Amendment, it would not be necessary to encase jury trials in state courts in the rigid mold of the Sixth Amendment jurisprudence.

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[9]Florida—*State v. Parker*, 87 Fla. 181, 100 So. 260; *Metropolitan Court v. Bishop*, 190 So. 2d 366; Nebraska—*State v. Amick*, 173 Neb. 770, 114 N.W. 2d 893; *State v. Lookabill*, 176 Neb. 254,125 N.W. 2d 695; New Jersey—*State v. Rodgers*, 91 N.J. L 212,102 A433; *Caruso v. Porter*, 102 N.J. L 71, 130 A805; *Latimer v. Wilson*, 103 N.J. L 159, 134 A750; New Mexico—*Hamilton v. Walker*, 65 N.M. 470, 340 P 2d 407.

Indeed, what is so fundamental to fairness about a twelve man unanimous jury?[10] It has been stated by legal commentators and historians that the number 12 was chosen in analogy to the twelve prophets and twelve deciples; or possibly the twelve stones referred to in Bible history; and the institution of twelve judges selected in ancient days to try matters of law are stated to be a possible precedent. Additionally there might be mentioned the Roman Code of the twelve tables and the fact that among Scandinavian nations twelve was a favorite number for constituting a court. Some legal scholars believe that the number twelve was adopted among the Anglo-Saxon and Normans from the twelve witnesses whom they believe sufficient to establish the credibility of a party to a transaction. It has even been suggested that the "twelve men good and true" represent the twelve Apostles and are divinely endowed with a unique fact finding ability. See Robert Moschzisker Trial by Jury (1922), pages 290-291; Silving Essays on Criminal Procedure, (Dennis and Co. 1964) page 53.

Jeremy Bentham said "Antiquity of the law is not reason. The antiquity of a law may create a prejudice in its favour, but it is not a reason of itself . . ." "Arbitrary definition is not reason. Nothing is more common among jurists and political writers than to

[10]Osborn, a document specialist after more than twenty five years observing jury trials throughout the United States, observed in *The Mind of the Juror* (Boyd Printing Company 1938) that jury fixers know that whenever the requirements of a unanimous twelve man verdict exists, it is necessary to reach only one juror in order to defeat justice.

build up theories, and even to construct huge works upon definitions that are purely arbitrary". Dumont's Bentham, *Principles of Legislation*, translated by John Neal (1830), pages 286, 287.

Neither antiquity nor arbitrary definition constitute any reason for holding that the unanimous agreement of an arbitrary number of twelve men, possibly based on superstition, is the only method of producing a fair finding of fact.

The absurdity that results from relying on ancient forms of the common law trial by jury is illustrated in a recent state criminal proceeding in Baton Rouge, Louisiana, reported in the Baton Rouge Morning Advocate of November 17, 1967. In that case the accused argued that if the word "peers" is defined as "persons of the same rank or standing" a nineteen year old defendant should be tried before a jury composed only of nineteen year olds.

This court has not hesitated to reject the English common law in certain instances when it did not measure up as a standard by which to determine the rights of Americans. See *Powell v. Alabama*, 287 U. S. 45, 65 (1932); (Common law right of counsel in misdemeanors but not felonies rejected); *Grosjean v. American Press Co.*, 297 U. S. 233, 249 (1936) (Common law licensing of the Press rejected); *Mallory v. Hogan*, 378 U. S. 1 (1964) (Common law rule that the admissibility of evidence is not affected by the illegality of the means through which the evidence was obtained was rejected); See Deutsch, *Civil Law*

*Influences on the Development of Civil Liberties*, 12 Tulane Law Review, 331 (1938); Orfield's *Searches and Seizures in Federal Criminal Cases*, 24 La. Law Review, 665, 666 (1964); *The Challenge of Crime in a Free Society*; a report by the President's Commission on Law Enforcement and Administration of Justice, page 306, note 18.

That the right to a unanimous verdict or a twelve man jury is not considered so hallowed or sacred even in England, its supposed land of birth, is seen by the English Criminal Justice Act of 1967, S.13.1:

> "In a case where there are not less than eleven jurors the jury need not be unanimous if ten of them agree, and in a case where there are ten it need not be unanimous if nine agree.
>
> A majority verdict of guilty may only be accepted if the foreman has stated in open court the number of jurors who respectively agree and dissented. A majority verdict must not be accepted unless it appears that the jury have had not less than two hours for deliberation or such longer period as the court considers reasonable having regard to the nature and complexity of the case. These provisions come into operation on 1st October 1967." Halsbury's Laws of England, Third Edition, Current Service, Issue 27 at Key No. E4388. See also Challenge of Crime in a Free Society, *op. cit. supra*, at page 307 wherein the above English law is pointed out with approval as one of the reformed measures tending to improve the administration of criminal justice.

Recently, as reported in the New York Times, an

English jury convicted an accused of murder by a 10 to 2 verdict, in accordance with the above quoted statute.

The time limitation of six months set by Congress in 18 U.S.C. Section 1, and by this Court in *Cheff v. Schackenberg, supra,* is an arbitrary figure based on expediency, having no relationship to the question of whether a fair trial is available to the accused under the Fourteenth Amendment standards. Yet the direct application to the states of the federal standard of jury trial under the Sixth Amendment would require the application of the mechanical six months' standard in every state regardless of an individual state's concept of what constitutes a minor crime.

The legacy of a holding that the Sixth Amendment Federal jury trial guarantee applies directly to the state will be uncertainty and chaos in the administration of criminal justice in those states providing for less than unanimous verdicts, in those states providing for less than twelve man juries; in those states defining minor crimes in any manner different from the federal definition; in those states providing a treatment for waiver of jury trials, different from the federal standards.

It is submitted that if this court should hold the federal Sixth Amendment jury trial right applicable to the states, it is incumbent on it, in the interest of the efficient administration of justice, to advise the states unequivocally of the status of convictions had

by less than twelve man unanimous verdicts and to delineate what crimes the states may treat as minor ones.

However, it is further submitted that the Sixth Amendment federal jury trial guarantee and the rules tailored for federal courts thereunder, should not be applied to the states; that this court's power of supervision over lower federal courts should not be extended to state criminal courts under the guise of the Sixth Amendment; and that the meaning of the Fourteenth Amendment's due process clause should not be distorted by equating it with those rules which were fashioned for the administration of criminal justice in federal courts.

## D. HISTORICALLY TRIAL BY JURY WAS NOT RECOGNIZED AT COMMON LAW, BY THE FRAMERS OF THE CONSTITUTION, OR BY LOUISIANA, AS AN ESSENTIAL ELEMENT OF A FAIR TRIAL.

There is little doubt that the right of trial by jury is of ancient origin.[11] It must be noted, however, that the historical origin of the right is not at issue;

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[11] III Blackstone, *Commentaries on the Laws of England*, *349-50; IV, Blackstone, *id.* at *349; Frankfurter and Corcoran, "Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury", 39 Harvard Law Review, 917, 923 (1926). In Socrates' trial (about 400 B.C.) 501 jurors voted. Socrates was found guilty by a majority of only 60. See Wigmore, Panorama of the World's Legal System, pp. 291, 312-313, 839; Potter, Historical Introduction to English Law, (2.ed) p. 14; Jolowicz, Historical Introduction to Roman Law (Cambridge University Press, 1952), p. 329, 411; Plucknett, A concise History of Common Law (5th ed. 1956) p. 106.

and, although appellee in no way wishes to belittle the relevance of history or the importance of the right of jury trial, appellee is constrained to point out that the issue before this Honorable Court is the scope and extent of the right to jury trial. Appellee respectfully submits that historical references are relevant only insofar as they shed light on this issue. It further submits that any argument, premised only on the sacredness of the right to jury trial and concluding to universal application in all areas of State prosecutions, utterly fails to shed light on the issue at hand.

Appellant has proposed that trial by jury was recognized at common law and by the framers of the Constitution as an essential element of a fair trial.[12] Since fundamental fairness is the very heart of due process, appellant has alleged history proves that, where there is a trial without a jury, there is a trial without due process of law. This simply is not so. Indeed, history and the decisions of this Honorable Court clearly show that there may be fair trials without a jury.

(1) *The Common Law Experience*

Magna Carta truly was of monumental legal proportions. It set the framework for numerous rights of Englishmen and Americans. It is unfortunate, however, that some later writers have ascribed to Magna Carta all of our rights. More specifically, it is ridiculous to allege that Magna Carta proves the right of every Englishmen (and therefore every American) to have a trial by jury in any prosecution against

[12]Appellant's brief, p. 12 *et seq.*

him.[13] Indeed, Magna Carta itself placed due process (or the law of the land) [14] in juxtaposition with judgment of peers.

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[13] "That the modern institution of trial by jury derives from Magna Carta is *one of the most revered of legal fables.* The belief is an obstinate example of the 'inevitable habit of reading later ideas into earlier institutions.' *Magna Carta neither granted nor guaranteed trial by jury.* The forms of the modern jury had not taken shape by 1215, although the principles from which they were to evolve found expression after the Norman Conquest. Modern scholarship has abundantly established that the *judicium parium* of the famous chapter 39 was not our verdict on the facts of 'twelve good men and true.' It was the ancient protection of the free Norman whenever embroiled with the law, whereby his peers, and not merely a king's justice, should determine what ordeal was to test his rights and how he should perform it." (References omitted, emphasis added). Frankfurter and Corcoran, *op. cit. supra* note 11, at 922-23. See also Perry, *Sources of Our Liberties* (c. 1959) 7-8. 1 Holdsworth, A History of English Law (5th ed. 1931) pp. 59, 323; McKechnie, Magna Carta, p. 178; Seldon, Notes on Fortescue's Laudibus Legem Angliae (London) Chapter 26, p. 87; Radcliffe and Cross, The English Legal System (3rd.3d 1954), pp. 49-50, 223-226; Hayes, Baldwin and Cole, History of Europe (Revised Ed. 1956) p. 264.

[14] Regarding "the law of the land", Perry states: "Although there has been much scholarly dispute on the subject, it appears that this phrase was intended by the barons to enunciate a concept very similar to the principle found in the Fifth and Fourteenth Amendments to the Constitution of the United States that no person may be deprived of life, liberty or property without due process of law.

"As early as the fourteenth century the 'law of the land' provision was considered to be identical with the concept of 'due process of law.'" (Reference omitted). Perry, *op. cit. supra.* note 13, at 5-6. See also, Radcliffe and Cross, op. cit. supra, Note 13, at pp. 49-50, 223-226; Hand, The Bill of Rights, (Oxford University Press 1958) p. 35.

> "No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, *except by the legal judgment of his peers or by the law of the land.*" [15] (Emphasis added.)

Thus, Magna Carta guaranteed the right to freedom unless such freedom was abridged by trial of peers *or* by due process.[16] "The Great Charter did not guarantee 'trial by jury' to anyone." [17]

From the year 1215 to the year of the adoption of the Constitution of the United States, there grew up side by side, in both England and the American colonies, the tradition of right to jury trial in most serious cases and non-jury trials or summary trials in numerous instances, including some serious offenses. As to the experience in England prior to 1787, in a well documented article, the much esteemed, late Mr. Justice Frankfurter and Thomas Corcoran concluded that:

> "Down to the separation of the colonies from the mother country this summary jurisdiction of the English magistrates had three salient

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[15]Chapter 39, Magna Carta, 1215, as translated, quoted in Perry, *op. cit. supra* note 13, at 17.

[16]Of a citizen's rights under Magna Carta, Kaye states: "He was entitled to protection *either* 'by the judgment of his peers, with its requirement of unanimous condemnation from twelve laymen like himself,' *or* 'by the law of the land,' on the stability and generality of which he had theretofore been content to rely." (References omitted.) Kaye, "Petty Offenders Have No Peers," 26 Chicago Law Review 245, 247 (1959).

[17]Taylor, *Due Process of Law* (1917), at 6.

features. (1) There was a specific withdrawal from trial by jury of specific offenses in specific statutes, rather than a general formula for summary procedure. (2) There was no unifying consideration as to the type of criminal offense subjected to summary trial nor any uniformity in the number of magistrates before whom the various offenses were tried. *Although the great majority of instances were aptly characterized as 'petty' violations, some bordered closely on serious felonies and were punished with appropriate severity.* The controlling factor seems less the intrinsic gravity of the offense, judged by its danger to the community, than the desire for a swift and convenient remedy. (3) Nor was there uniformity about appeals. The earlier statutes gave no appeal. Beginning with Charles II the more serious offenses, excepting infractions of excise laws, could be retried by the justices in sessions sitting *without* a jury. But this was largely a paper privilege, for offenders with purses long enough to afford a retrial were few." [18] (References omitted, emphasis added.)

For an excellent judicial statement regarding the broad extent of non-jury trial at common law, (including cases of assaults and batteries), see also *State v. Maier*, 13 N.J. 235, 99 A.2d 21 (1953), particularly at 25-29. At p. 29, Chief Justice Vanderbilt summarized the law of that era thus:

"In any event, there can be no doubt of the power of the justice of the peace at common law before

[18] Frankfurter and Corcoran, *op. cit. supra* note 11, at 927.

1776 to punish common or simple assaults and assaults and batteries summarily without presentment or indictment and without trial by jury." [19]

(2) *The American Colonial and Constitutional Experience.*

The American colonial experience of widespread non-jury trials was very similar to the English. In a careful examination of the law of seven of the American colonies, Frankfurter and Corcoran conclude that two points are clearly seen:

> "first, that all of the colonies whose records have been examined, acted on the conviction that the much cherished jury procedure was not imperative for small offenses; secondly, that the practice of summary procedure, pursued in varying measure by the different colonies, persisted unchallenged through the acrimonious controversy with the Crown over the denial of the jury in admiralty courts, through the framing of the jury clauses in state constitutions, and through the enactment of the jury clauses in the Federal Constitution." [20]

The authors cite in detail numerous different offenses and penalties, triable in these colonies by a court without a jury.[21]

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[19] See also IV Blackstone, *Commentaries*, *280 *et seq.* in which that author argues against but admits the broad coverage of summary trial. See also Kaye, *op. cit. supra.* note 16 at 247, in which that author, too, admits the broad scope of non-jury trials, including those for grievous offenses. "Prosecutions of serious derelictions were also authorized without jury intervention." (Reference omitted) Ibid.

[20] Frankfurter and Corcoran, *op. cit. supra* note 11, at 937.

[21] *Ibid.* at 938-65 and at 983-1019.

It is indeed true that the right to jury trial was a burning issue in the minds of the colonists in the pre-revolutionary days. Thus, in the Declaration and Resolves of The First Continental Congress, dated October 14, 1774, there appears this resolution:

> "Resolved, N.C.D. 5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage according to the course of that law." [22]

What underlay this declaration was not the extension of summary jurisdiction over minor offenses, such as battery, for which non-jury trial had long been the previous mode of trial. Rather, this declaration was motivated by certain Parliamentary acts which permitted the colonist, charged with treason, to be tried in England by a jury of Englishmen, rather than of fellow Americans. Another act of Parliament, providing the death sentence for anyone destroying His Majesty's ships, authorized trial where the crime was committed or in England. A further Act authorized the sheriffs of Massachusetts, appointed by the Crown's Governor, to select and, thus, control a jury.[23] Clearly, the harsh measures enacted during the reign of King George III cannot be used as authority to conclude that history proves the right of trial by jury in every penal action.

Similarly, the draftsmen of the Declaration of In-

[22] As quoted in *Perry, op. cit. supra* note 13, at 288.
[23] Perry, *op. cit supra* note 13, at 281-82.

dependence, complained of the deprivation ". . . in many cases of the benefits of trial by jury." [24] However, it would be erroneous to conclude that this meant that they wanted trial by jury in every instance. They wanted the integrity of the judiciary and its independence of King George III reestablished; *viz.* "He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." [25] Likewise, the same serious inroads upon traditional jury trial that prompted the above-mentioned Declaration and Resolves of the First Continental Congress were the motivating factors here. Thus, they complain further of King George III: "For transporting us beyond seas to be tried for pretended offenses;" [26] Preservation, not extension, of the traditional right to jury trial was their purpose; and, as has been seen, this traditional right recognized the broad scope of summary trials.

Appellant relies on the fact that eleven of the former colonies adopted constitutions providing trial by jury after the pattern of English law.[27] Properly understood, it is an accurate statement because the pattern of English law and of the early state law always recognized the propriety of broad summary jurisdiction in the cases of less serious offenses, while still recognizing the desirability of jury trial in most serious matters. There is little doubt that, even in

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[24] 1 Stat. 1, 2, July 4, 1776.

[25] Declaration of Independence, 1 Stat. 1, 2, July 4, 1776.

[26] *Ibid.*

[27] Appellant's brief, at 13.

those instances where early state constitutions enunciated the right to jury trial in very broad terms, the actual intent, understanding, and practice of those states upheld the legality and propriety of non-jury trial.[28]

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[28]The Virginia Constitution, whose Bill of Rights was the prototype of the Bill of Rights of the United States Constitution (Perry, *Sources of Our Liberties* (c.1959) at 309), provided at Section 8: "That in all capital or criminal prosecutions a man hath a right to . . . a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty; . . . that no man be deprived of his liberty, except by the law of the land or the judgment of his peers." (As quoted in Perry, *op. cit. supra*, at 312.) But the actual practice clarified this constitutional statement. "In this colony we again find voluminous evidence of the dispensation of the jury in trials for minor offenses. . . . At the time of the Revolution at least sixty-five offenses were thus entrusted to the summary power of magistrates without jury and without right of appeal. . . . The Revolution brought no change in this practice, despite the jury clause of the Virginia Bill of Rights." Frankfurter and Corcoran, *op. cit supra.* note 11, at 962-64. See also, 1 Craven, the Southern Colonies in the 17th Century (1949), pp. 168-169, 270-271, 287.

The provisions of certain other early state constitutions were similarly worded. See Constitution of Pennsylvania, August 17, 1776, at Sec. IX. Quoted in Perry, *op. cit supra*, at 330. For documentation that broad summary jurisdiction in Pennsylvania was authorized both before and after this constitution was enacted, see Frankfurter and Corcoran, *op. cit. supra.* note 11, at 954-957.

The jury trial provision of the Delaware Declaration of Rights of 1776 set out at Section 14, as quoted in Perry, *op. cit supra*, at 339, and was similar to the Virginia wording.

The jury trial provision of the Maryland Constitution of

This, then, is the background against which the drafters of the United States Constitution authored the jury provisions of the Federal document (Article III, Section 2 and Sixth Amendment). When the con-

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1776, was set out at Section XIX, as quoted in Perry, *op. cit. supra*, at 348, and was similar to the Virginia clause. However, note the wording of Section III, quoted at p. 346: "That the inhabitants of Maryland are entitled to the common law of England, and the trial by jury, *according to the course of that law. . . .*" (Emphasis added.) Again note that widespread summary jurisdiction was broadly exercised and considered in perfect harmony with the constitutional right to jury trial. Frankfurter and Corcoran, *op. cit. supra* note 11, at 957-962, particularly at 960.

The Constitution of North Carolina of 1776 made explicit reference to the customary prior usage and understanding of the right to jury trial; Section IX states: "That no freeman shall be convicted of any crime, but by the unanimous verdict of a jury of good and lawful men, in open court, *as heretofore used.*" (Emphasis added.) As quoted in V Thorpe, *The Federal and State Constitutions, Colonial Charters and other Organic Laws, (1909) at 2787.* See also, Craven, The Southern Colonies in the 17th Century, (1949) pp. 354-355.

Vermont was not one of the thirteen original states. However, the Constitution of Vermont of 1777 had its jury right clause set out at Ch. 1, Sec. X, as quoted in VI Thorpe, *op. cit supra*, at 3741. It was similar to the provision of the Virginia Constitution.

The Constitution of Massachusetts of 1780, Part I, Sec. 12, provided for jury trial only in limited instances. It stated in pertinent part:

> And no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, *but by the judgment of his peers, or the law of the land.*
>
> And the legislature shall not make any law that shall

stitutional authors stated that there shall be a trial by jury for all *crimes* and in all *criminal prosecutions*, did they call for universal application of trial by jury in all penal actions against an individual?

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subject any person to a *capital* or *infamous* punishment, excepting for the government of the army and navy, without trial by jury." (Emphasis added.)

Quoted in III Thorpe, *op. cit. supra*, at 1891. Note, too, the constitutional authority of the justice of the peace at Part II, Chapter III, Sec. III, quoted, *ibid*, at 1906. For the actual practice in Massachusetts at that time and proof of wide spread summary jurisdiction, see Frankfurter and Corcoran, *op. cit. supra* note 11, at 938-942.

The provisions of the Constitution of New Hampshire of 1784 regarding jury trial (Article I, Sections XV and XVI) were also very limited and were substantially similar to the Massachusetts provisions. See, IV Thorpe, *op. cit. supra*, at 2455.

Article XXII of the New Jersey Constitution of 1776 provided:

> "That the common law of England, as well as so much of the statute law, as have been heretofore practiced in this Colony, shall still remain in force, until they shall be altered by a future law of the legislature; such parts only excepted, as are repugnant to the rights and privileges contained in this Charter; and that the inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever."

As quoted in V Thorpe, *op. cit. supra*, at 2598. It should be noted that this was probably an even stronger statement of the right to jury trial than that in the United States Constitution. Nevertheless, it is undisputed that the intent and application of this right were in perfect harmony with widespread summary jurisdiction in New Jersey, including cases of battery tried by judge without jury. See, Frankfurter and Corcoran, *op. cit. supra*, note 11, at 949-954. See, also *State*

This Honorable Court has answered that question in the negative as recently as in 1966. In *Cheff v. Maier*, 13 N.J. 235, 99 A.2d 21 (1953). Once again it is made clear that these early states' concern was to preserve, not extend, the right to jury trial, as it had been previously exercised.

Section XIII of the New York Constitution of 1777 provided that no citizen may suffer any deprivation ". . . unless by the law of the land, or the judgment of his peers." As quoted in V Thorpe, *op. cit. supra*, at 2632. Section XLI provided that: ". . . trial by jury, in all cases, in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate forever." *Ibid*, at 2637. It is well documented that New York recognized wide summary jurisdiction in harmony with these constitutional guarantees, both before and after the enactment of this constitution. Frankfurter and Corcoran, *op. cit. supra* note 11, at 944-949, particularly at 946-7.

Article XLI of the Constitution of North Carolina of 1778 guaranteed the individual only no deprivation of liberty ". . . but by the judgment of his peers or by the law of the land." VI Thorpe, *op. cit supra*, at 3257. This was only the Magna Carta type provision; and, presumably, extensive summary jurisdiction grew up under it just as it did under Magna Carta, and the other states.

The Georgia Constitution of 1777 did not mention in what, if any, instances a jury trial was guaranteed. See Articles XL-XLIII, II Thorpe, *op. cit. supra*, at 783.

Connecticut drafted no constitution at or about the time of the Revolution. However, it is well documented that Connecticut had extensive non-jury trial jurisdiction both long before and long after 1776. See Frankfurter and Corcoran, *op. cit. supra*, note 11, at 942-4.

Likewise, Rhode Island drafted no constitution during that period. However, Kaye states of its trial and summary practice: "Like Connecticut, it governed itself under the English law incorporated by its colonial charter as amended from time to time." Kaye, *op. cit. supra* n. 16, at 249.

*v. Schnackenberg*, 384 U.S. 373, 379 (1966), the Court quoted with approval its holding in *District of Columbia v. Clawans*, 300 U.S. 617, 624 (1937):

> "It is settled by the decisions of this Court . . . that the right of trial by jury . . . does not extend to every criminal proceeding. At the time of the adoption of the Constitution there were numerous offenses, commonly described as 'petty,' which were tried summarily without a jury. . . ."

The Court, in explicitly holding that the prosecution of a petty offense requires no jury trial, also quoted with approval at 384 U.S. 379 the following statement from *Callan v. Wilson*, 127 U.S. 540, 557 (1888):

> ". . . in that class or grade of offences called 'petty offences,' which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, a jury trial is not required."

See also, *Natal v. State of Louisiana*, 139 U.S. 621 (1891); *Lawton v. Steele*, 152 U.S. 133, at 141-142 (1894); *Schick v. United States*, 195 U.S. 65, at 68-72 (1904) and *District of Columbia v. Colts*, 282 U.S. 63, 72-73 (1930). Each of the foregoing cases recognizes the validity of summary criminal jurisdiction under the United States Constitution. Each of these cases was cited with approval by this Honorable Court in *Cheff, supra*. Consider, also, 18 U.S. 1(3) and Federal Rule of Criminal Procedure 23(a).

Thus, history and the decisions of this Court concur in their findings that the right to jury trial does not extend to every prosecution in the name of the

government against an individual. It should be noted, however, that this well recognized exception to jury trial does not entail an exception to the due process requirements of the Fifth or Fourteenth Amendments to the United States Constitution. Indeed, it is elementary that the due process requirements of those amendments apply to every abridgment of one's liberty or taking of one's property by a government, Federal or State. Thus, the *Natal* case,[29] discussed above, which was decided expressly on the issue of due process vel non, upheld trial without a jury. Similarly, in *Tumey v. Ohio*, 273 U.S. 510 (1927) this Court again applied the precepts of due process to a petty offense case.

In *Gaskill v. Commonwealth*, 144 S.E. 2d 293 (1965) the Supreme Court of Appeals of Virginia said:

> "It is undeniably true that certain rights secured under the first eight amendments to the Federal constitution have been held to be implicit in the concept of ordered liberty and hence binding on the states through the due process clause of the Fourteenth Amendment. *But certainly the right of a trial by jury has never been deemed a sine qua non to the rendition of justice in all criminal cases—if so, not even the most petty offenses would be triable without a jury.*" (Emphasis Supplied.)

It is obvious that due process does not require a trial by jury; for, otherwise, there could never be a

[29] 139 U.S. 621 (1891).

trial without a jury, either Federal or State. As shown by *Natal* and *Tumey*, due process obtains in the smallest of penal actions. Trial by jury does not. Jury trial obtains in Federal prosecutions in all non-petty cases by reason of Article III, Section 2 and the Sixth Amendment, United States Constitution. Jury trial obtains in State prosecutions only by reason of State law; for the only vehicle for applying the Federal jury trial clauses to the States, the due process clause of the Fourteenth Amendment to the United States Constitution, does not include the right to jury trial.

Mr. Justice Cardozo, speaking for this Honorable Court, stated it this way:

> "The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so noted in the traditions and conscience of our people as to be ranked as fundamental'. . . . Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them." [30]

It is submitted that this Honorable Court made the proper distinction in *Irvin v. Dowd*,[31] when it insisted upon the integrity of the jury in that instance since the applicable state law called for a jury trial.

As this Court pointed out in its recent review of a

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[30] *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). See also, *Fay v. New York*, 332 U.S. 261, at 288, 294-5 (1947).

[31] 366 U.S. 717, 721-2 (1961).

murder trial, in *Turner v. Louisiana*, 379 U.S. 466, at 471 (1965):

> "This case does not involve the question whether the Fourteenth Amendment requires a State to accord a jury trial to a defendant charged with murder. The question, rather, goes to the nature of the jury trial which the Fourteenth Amendment commands when trial by jury is what the State has purported to accord. We had occasion to consider this basic question less than four years ago in *Irvin v. Dowd*, 366 U.S. 717."

Thus, no State may require a jury trial under the guise of protecting the defendant's rights and at the same time so tamper with that jury as to produce an unfair hearing. And, as appellant has pointed out,[32] this Court has protected the integrity of the jury wherever the trial by such has been required. It would be patently erroneous, however, to conclude that the Court's action means, or in any way implies, that a State must have a jury trial in every prosecution.[33]

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[32]The cases cited by appellant in the text of his brief at pp. 17-18, regarding this Court's concern for the integrity of trial by jury, all proceed on the premise that a jury trial, where the defendant is tried by jury, must be fair, must be in accord with due process. None of those cases pertain to the issue at hand; i. e., the scope of the right to jury trial. The only relevant issue to which those cases pertain is their showing that due process obtains in every trial, a conclusion with which appellee in no way disagrees. When cited as authority for concluding to the universal application of jury trial, their use is seriously contested by appellee.

[33]Appellant's brief at pages 15-16 cites and quotes numerous opinions of this Court, in which the issue before the Court was the right of a civilian, charged with a grave felony, to be tried by a civilian court rather than by a court-martial

Key concepts of due process prevail at every level. They apply to every prosecution, whether by States or by the Federal Government. They apply to trials of petty offenses by the Federal Government. The Fifth Amendment to the United States Constitution affords Federal petty offenders due process; it does not afford them a jury trial. Similarly, the Fourteenth Amendment affords State offenders due process; it does not afford them a jury trial.

(3) *Louisiana History of Jury Trial*

Appellee does not rest its case solely on the peculiarities of Louisiana history. However, it does feel that the history of Louisiana law clearly reflects the great trust that Louisiana has placed in its judiciary and the great emphasis it has placed on trial by judge without jury, both in criminal and civil matters. Regarding civil matters, the attention of the Court is respectfully invited to Louisiana Code of Civil Procedure, Article 1733, rendering civil jury trials unavailable in certain broad instances, and to Article 7, Sections 10 and 29, Louisiana Constitution, in which the State Supreme Court and Courts of Appeal are given appellate jurisdiction over both law and facts in

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or military tribunal. Obviously, the statements of the Court in the context of that issue in no way reflect light upon the issue of the scope of jury trial within the civilian legal system. To hold that it is beyond the authority of the Federal Government to try by court-martial, citizens charged with capital offenses against military personnel or with homicides of military personnel, in no way is a holding that every citizen, chargeable with a lesser offense, is entitled to a civilian jury trial.

civil cases. For a brief review of Louisiana's history of right to jury trial in criminal cases, see Appendix C.

As may be seen from that history, there was no jury trial under either the French or the Spanish administration. Upon Louisiana's becoming a possession of the United States, there was broad authorization for non-jury trial, and a jury trial was granted in a case of simple battery, only if demanded.

The case of *Natal v. State of Louisiana*, 139 U.S. 621 (1891), establishes that at least since 1852, non-jury trials for violations of municipal ordinances were constitutionally authorized in Louisiana. At 139 U.S. 624, this Court stated:

> "The ordinance of the City of New Orleans, prohibiting the keeping of a private market within six squares of any public market of the city, under penalty of a fine of twenty-five dollars, and of imprisonment for not more than thirty days if the fine is not paid, was within the authority constitutionally conferred upon the city council by the Legislature of the State. A breach of such an ordinance is one of those petty offenses against municipal regulations of police, which in Louisiana, or elsewhere, may be punished by summary proceedings before a magistrate, without trial by jury. Louisiana Constitution of 1852, Arts. 103, 124; Constitution of 1868, Arts. 6, 94; *State v. Gutierrez*, 15 La. Ann. 190; *Monroe v. Meuer*, 35 La. Ann. 1192; *Callan v. Wilson*, 127 U.S. 540, 553, 555."

It is noted that the same or similar authorization for municipal offenses to be tried without a jury, that

were cited in *Natal*, were also found in the Constitution of 1845, at Title VI, Article 128 and at Title IV, Article 81. See Appendix C. Such authorization may have been contained even in the Constitution of 1812 at Section 23. See Appendix C. From this earliest period to date, such non-jury trials have consistently been authorized in Louisiana.

Regarding State prosecutions for misdemeanors, since 1898 to date, almost seventy years, both the State's constitutions and legislative laws have precluded trial by jury. See Appendix C.

For the most recent pronouncement of the Louisiana State Supreme Court upholding the constitutionality of non-jury trials of misdemeanors, see *State of Louisiana v. Reuben L. Jones*, No. 48,610, decided December 11, 1967. Therein at p. 5, the Court stated:

> "It seems to be well established by the decisions of the United States Supreme Court that the constitutional right of trial by jury does not extend to every criminal proceeding, and that a jury is not demandable in trials for petty offenses. *Callan v. Wilson*, 127 U.S. 540, 32 L.ed 223, 8 S.Ct. 1301; *District of Columbia v. Clawans*, supra; *Cheff v. Schnackenberg*, 384 U.S. 373, 16 L.ed2d 629, 86 S.Ct. 1523, and the many authorities there cited. . . ."

At pp. 6-7, the Court stated:

> ". . . we are unable to perceive that an accused in a misdemeanor case is necessarily denied due process or a fair trial when he is tried by a judge instead of a jury. A fair trial, as we

> understand the expression, means simply a trial that is just; a trial in which the accused is given the benefit of all the safeguards provided by the Constitution and laws and one in which even-handed justice is dispensed. We cannot conceive, in the absence of proof to the contrary, that there is any rational basis for declaring that an unbiased judge cannot dispense justice in a misdemeanor case with the same quality of fairness and impartiality which could be expected of a jury which acts under the instructions of the judge. . . ."

In summary, Louisiana has long entrusted its judiciary with broad powers in the adjudication of personal and property rights. This Court paid due deference to the propriety of maintaining such local legal institutions.

> "But beyond requiring conformity to standards of fundamental fairness that have won legal recognition, this Court always has been careful not so to interpret this Amendment (Fourteenth Amendment to U.S. Constitution) as to impose uniform procedures upon the several states whose legal systems stem from diverse sources of law and reflect different historical influences." (Parenthetical matter added; reference omitted) *Fay v. New York*, 332 U.S. 261, 294 (1947).

See also. *Spencer v. Texas*, 385 U.S. 554, 564 (1967).

## E. A SUBSTANTIAL NUMBER OF STATES DO NOT TREAT JURY TRIALS AS A BASIC RIGHT.

Appellant's claim that in 38 states, a criminal defendant subject to a maximum term of imprisonment

in excess of six months cannot be convicted without the unanimous verdict of a twelve man jury, is inaccurate and misleading.[34] Appellant's "Appendix B" does not support his generalities which sweep too broadly as demonstrated below:

1. *Alabama*—Constitution, Article 1, Sec. 6 requires a jury only in prosecutions by indictment as follows: "that in all criminal prosecutions the accused has a right to be heard . . . *and in all prosecutions by indictment* a speedy public trial by an impartial jury . . ." By statute, Alabama has provided that any misdemeanor may be instituted by information and tried in a court of inferior jurisdiction without a jury. A person convicted in a court of inferior jurisdiction may appeal to the circuit court and ask for a jury, but he is required to stand trial first in a court of inferior jurisdiction without a jury. Alabama Code, Title 15, Section 321. Alabama's definition of misdemeanor is the same as that of Louisiana. Title 1, Sec. 7, Code of Alabama of 1940.

2. *Arkansas*—Police Courts which have concurrent jurisdiction with Justice of the Peace Courts over all misdemeanors committed in violation of state law within city limits and Mayor's Courts, try misdemeanors without juries. Arkansas Statutes Ann., Sections 22-738; Sections 44-114, 44-115, 44-116.

3. *Delaware*—Jury trial is not required in any

[34]Reminiscent of the well known propaganda device called "card-stacking", selecting only that part which supports one's view and leaving out the rest. See Starratt Lewenstein, Our American Government Today, (2d ed. 1966) pp. 123-124.

misdemeanor cases. Imprisonment of more than six months may be imposed by Justice of the Peace Courts and by the Municipal Courts of Wilmington, which conducts trials of misdemeanors without a jury. In two counties of Delaware a defendant may elect to go into the Court of Common Pleas and be tried by a jury, but in New Castle County there is no opportunity for a jury trial as the Court of Common Pleas does not have a jury. A defendant tried in the Court of primary jurisdiction without a jury has a right to appeal to the Superior Court for a trial de novo with a jury. Thus in New Castle County in Delaware all misdemeanors must be tried in the Court of primary jurisdiction, without a jury. See letter from the Attorney General of the State of Delaware, dated November 20, 1967, which letter is contained in Appendix "B" of this brief.

4. *Maine*—Justices of the Peace, trial justices, municipal courts and district courts try all misdemeanors without juries. However, a defendant may appeal a conviction and be tried de novo with a jury. *Sprague v. Andro Scoggin* 71 Atlantic 1090, 1091 (1908); page 172 Main Rules of Criminal Procedure. Although Maine rejects the petty offense concept, it requires a defendant to be tried in the first instance by a judge acting without a jury. *Johnson's Case*, 1 Me. 230 (1821).

5. *Maryland*—Motor Vehicle cases which carry penalties of more than six months' imprisonment are tried without juries. Local courts try misdemeanors

other than traffic offenses, without a jury, but the accused may elect to be tried by a different court with a jury. See letter of the Attorney General of Maryland, dated November 17, 1967 which is included in Appendix "B" attached hereto.

6. *Massachusetts*—District Courts and the Municipal Court of Boston try, without a jury, all misdemeanors and all felonies punishable in the penitentiary for five years or less. The sentences imposed by these courts may not exceed two and one half years and may not be in the penitentiary. Massachusetts General Laws, Chapter 218, Sections 26-27. However, if a defendant wants to take a chance of getting a stiffer sentence, and going to the penitentiary, he may appeal and get a trial de novo before a jury in Superior Court. Massachusetts General Laws, Chapter 212, Sec. 6 and Chapter 263, Sec. 6. Thus, Massachusetts gives a bonus to a defendant who is tried without a jury and places one who elects to be tried de novo in Superior Court in a position in which he takes a chance on a stiffer penalty.

7. *Minnesota*—In local courts for a violation of a municipal ordinances there is no right to a jury trial. *State v. Ketterer*, 248 Minnesota 173, 79 N.W. 2d. 136 (1956).

8. *Nebraska*—Violations of municipal ordinances are tried by Police Magistrate without a jury, whether or not the same conduct constitutes a state offense, which is triable by a jury in state court. *State v. Lookabill*, 176 Nebraska 125 N.W. 2d 695. As stated by the Attorney General of Nebraska in his letter of

November 12, 1967, contained in Appendix "B"—"as a matter of actual practice, a jury is rarely demanded. In my seven years in the private practice in a small community, I only recall a jury having been demanded on one occasion. Also, I just talked with the judge of one of our busier inferior courts here in Lincoln, and it has been more than five years since a jury was demanded in his court".

9. *New Hampshire*—All misdemeanors punishable by fine not exceeding $1,000.00 and imprisonment not exceeding one year, or both, are tried in District Court without a jury. New Hampshire Revised Statutes, Ann. 502:18. If punishable by a maximum $500.00 fine and imprisonment not exceeding one year, a misdemeanor is tried by Municipal Court without a jury. Art. 77 of the State Constitution allows the legislature to give inferior courts power to try, subject to appeal and trial by jury, all criminal causes wherein punishment is less than imprisonment in the penitentiary. Under the statutory scheme a defendant must first submit to the trial of a misdemeanor in a district or municipal court and then appeal to superior court before he can have a jury trial. Statistics compiled by the State of New Hampshire Judicial Counsel show that for the year ending 1966, out of 51,197 criminal cases tried without a jury, only 562 appealed to Superior Court where a jury trial might be had. See letter of Attorney General of New Hampshire, dated November 15, 1967 and memorandum of State of New Hampshire Judicial Council dated July 21, 1967, included in Appendix "B".

10. *New Jersey*—All disorderly person offenses, carrying a maximum penalty of one year in jail or $1,000.00 fine, or both, are tried without a jury. N.J.S. 2A:169-4. Such offenses are considered minor and are tried summarily without indictment or trial by jury. The minor nature of the offenses, rather than the penalty determines whether trial by jury will accrue. *State v. Maier*, 99 A 2d 13, 21 N.J. 235 (1953); *Latimer v. Wilson*, 103 N.J. L. 159 (1926). The Magistrate's Court may also summarily proceed with many assorted offenses, including motor vehicle violations and other offenses which are specified in the letter of the Attorney General of the State of New Jersey, dated November 17, 1967 which is included in Appendix "B" hereof.

11. *New York*—As conceeded in Appellant's brief, offenses carrying one year imprisonment may be tried in the Courts of New York City without a jury.

12. *New Mexico*—Art II Sec. 12 of the state constitution provides that the right to trial as it heretofore existed shall remain "inviolate". The law applicable at the adoption of the state constitution, Sec. 1047, 1897 Compiled Laws of New Mexico, limited trial by jury to prosecutions instituted by indictment or information. Therefore, jury trial in New Mexico does not extend to any crime which did not exist under territorial law immediately prior to the adoption of its constitution and the prosecution of which was not instituted by indictment or information.

13. *North Carolina*—Article 1, Sec. 13 of the State Constitution provides for jury trials but allows

the State Legislature to provide other means of trial for misdemeanors. By statute, all misdemeanors are tried in District Court without a jury. North Carolina General Statutes, 7A-272 and 7A-196E. The defendant has a right to appeal to the Superior Court where he is given a trial de novo with a jury.

14. *Oregon*—There is no right to jury trial in habitual criminal proceedings, Oregon Revised Statutes 168.015 and 168.090; *State v. Hoffman*, 236 Oregon 98, 385 P. 2d 741 (1963). There is no right to jury trial in cases of indeterminate life sentences, upon conviction of certain sexual offenses. Oregon Revised Statute 137, 111; *State v. Dixon*, 238 Oregon 121, 393 P.2d 204 (1964).

15. *Puerto Rico*—The Constitution requires trial by jury only for felonies. All misdemeanors are tried without a jury. See *Fournier v. Gonzales*, 269 Federal 2d 26 (1st Circuit 1959), a murder prosecution, wherein it was held that the Fourteenth Amendment of the Federal Constitution does not require trial by jury in Puerto Rico. The letter of the Attorney General of the Commonwealth of Puerto Rico, dated November 15, 1967, citing numerous authorities, is included in Appendix "B" in support of the above statements.

16. *Rhode Island*—Although the State Constitution, Art. 1, Sec. 10 requires trial by jury in all criminal prosecutions, initial jurisdiction over all misdemeanors (offenses punishable by a fine not exceeding $500.00 and/or one year's imprisonment) is conferred on District Courts or Municipal Courts where

defendants are tried by a judge without a jury. See 12-3-1 General Laws of Rhode Island. There is a right to appeal de novo to Superior Court with a trial by jury. Secs. 12-22-1 and 12-22-9, General Laws of Rhode Island.

17. *Virginia*—The State Constitution, Sec. 8 authorizes the Legislature to provide for the trial of offenses which are not felonious by a Justice of the Peace or another inferior tribunal without a jury, with the right to appeal and trial de novo before a jury, which appeal must be taken within ten days of conviction. Virginia Code Ann. Sec. 16.1-132. The maximum penalty for misdemeanors is $500.00 and/or confinement in jail for twelve months. In addition, "petty offenses" which were triable without a jury at the time of the adoption of the Virginia Constitution in 1776 are not triable by a jury because they are not considered either crimes or misdemeanors in Virginia. *Ragsdale v. Dannville*, 82 S.E. 77 (1914).

18. *Virgin Islands*—By Act of Congress, July 22, 1954, Chapter 558, 68 Stat. 497, misdemeanors which are tried in *District Courts* are triable before a jury where the penalty exceeds six months. But misdemeanors which are tried in *Municipal Court*, established by the Legislature of the Virgin Islands, are tried without a jury and the penalty can exceed six months. See page 2 of letter of Attorney General of the Virgin Islands, dated November 20, 1967, which letter is included in Appendix "B" hereto.

From the above survey it is clear from the treatment accorded jury trials in the states enumerated

above that even where it is provided it is not considered a basic right. Thus, in Alabama, Delaware, Maine, New Hampshire, North Carolina, Rhode Island and Virginia, defendants must first submit to a trial before a judge without a jury before they can appeal and receive a jury trial. The denial of the right to trial by jury in the courts of primary jurisdiction, requiring the defendants to undergo the expense and time loss inherent in an appeal in order to secure a jury trial, limiting defendants to a short period within which to do so, and providing that their right is waived unless exercised within the rigid rules prescribed, make it clear that those states which provide such a system do not consider jury trial as fundamental or necessary to a fair trail. The discrepancy between the number of trials held without a jury in New Hampshire (51,197) and the number of cases appealed for a trial de novo before a jury (562) shows that there are many defendants who are unable or unwilling to assume the risk and burden concomitant to an appeal. Only an unfettered right to a jury trial would meet due process requirements if jury trial was essential to a fair trial. Those states requiring trial without a jury in inferior courts of primary jurisdiction necessarily believe that such a trial is a fair one, otherwise such trials would be void and empty proceedings.

In Maryland, New Jersey, New York, Oregon, Puerto Rico and the Virgin Islands we have seen from the above survey that misdemeanors carrying more than six months penalty are tried without juries and

in Massachusetts we have seen that Defendants electing to be tried with a jury are subjected to a chance of receiving heavier sentences. Such treatment by the states is contrary to any attitude that jury trial is necessary for a fair trial.

With reference to the modification by the various states of the common law twelve man jury, in addition to those pointed out by Appellant, the following states have rejected the idea of the jury required by the Sixth Amendment:

*Arizona*—Const. Art. 2, § 23—Provision may be made by law for a jury of a number less than 12 in courts not of record.

*Arkansas*—Jury of 6 in justice of the peace courts which try misdemeanors. Ark. Stat. Ann. Sec. 26-608 (Repl. 1962)

*Colorado*—Art. II, Sec. 23 of state constitution provides that in criminal cases in courts not of record, a jury may consist of less than 12 persons. Rule 123(b) of the Colorado rules of Criminal Procedure provides for a jury of 3 in the trial of any misdemeanor. A defendant may ask for a jury of 12, but must advance one day's juror fee for each juror over 3, which fee is taxed as costs. See 78-7-4 Colo. Rev. Stats. 1963.

*Connecticut*—Conn. Gen. Stat. Ann. § 54-82—Accused may choose to be tried by court instead of jury or in non-capital cases, he shall be tried by a jury of 6 unless he asks for jury of 12.

*Delaware*—Del. Super. Ct. (Crim) Rule 23b—

Jury is to be composed of 12, yet before verdict parties may stipulate it will be composed of less than 12.

*Georgia*—The State Const., Art. 6, Sec. 16, par. 1, allows the legislature to prescribe a jury of not less than five for all trials except in Superior Court. The legislature has provided juries of less than 12 for special county criminal courts which try all misdemeanors in the county. See *McIntyre v. State*, 11 S.E.2d 6 (1940); *Welborne v. Donaldson*, 41 S.E. 999 (1902).

*Illinois*—Const. Art. 2, § 5—Trial may be by consent of parties with less than 12 jurors. *Rehm v. Halverson*, 64 N.E. 388 (1902); *Polvich v. Glodich*, 142 N.E. 466 (1924) or may be waived, *People v. Hepkins*, 194 N.E. 2d 213 (1964).

*Kansas*—Kan. Gen. Stat. Ann. 60-248 (referred to in 62-1412) says parties may stipulate number of jurors or number required to render verdict.

*Maryland*—Md. Rules P. 743—Jury shall consist of 12 but before verdict parties may stipulate that it shall consist of less than 12.

*Michigan*—Const. Art. 1, § 20—Jury may be less than 12 in courts not of record.

*Mississippi*—Miss. Code Ann. § 1836 provides for a jury of less than 12 in justice of the peace courts.

*Missouri*—Art. 1, Sec. 22 provides that in non-record courts there may be less than 12 and that a ⅔ majority rules.

*Montana*—Art. III, sec. 23 provides for a jury of less than 12 when not a felony and provides for a 6 man jury in justice of the peace court.

*Nebraska*—Art. I, sec. 11—May have less than 12 for misdemeanors. Neb. Rev. Stat. §18-205 says no more than 6 for misdemeanors in police courts.

*Nevada*—Nev. Rev. Stat. §186.010 et seq., in justice courts, the jury may be from 3-12.

*New Mexico*—N.M. Stat. Ann. §36-12-3 in justice of the peace courts 6 man jury.

*North Carolina*—Art. IV, sec. 27 defendant in Justice of peace courts may demand jury of six. N.C. Gen. Stat. §7-204 provides for six man jury in recorder's court (an inferior court).

*North Dakota*—Art. I, sec. 7 provides for less than 12 in non-record courts.

*Ohio*—Ohio Rev. Code Ann. §2938.06 allows the accused to stipulate for less than 12 in a magistrate's court.

*Oregon*—10 out of 12 jurors may return a verdict in any crime other than murder in circuit court. It all courts other than circuit courts, juries are composed of less than 12 members. *State v. Osbourne*, 153 Oregon 484, 57 P.2d 1083 (1936).

*Puerto Rico*—Nine out of twelve are required to convict.

*Texas*—A jury of 6 for misdemeanors tried in county court. Art. 33.01 Texas Code of Criminal Procedure; a jury of 12, 9 of whom may

render a verdict for misdemeanors tried in District Court, Art. 37.02, Texas Code of Criminal Procedure.

*South Dakota*—Art. VI, sec. 6 says legislature may provide for a jury less than 12 in courts not of record.

*Tennessee*—Tenn. Code Ann. §40-2504 provides for a six man jury for a misdemeanor which does not involve imprisonment.

*Vermont*—Vt. Stat. Ann. Tit. 12, §1505 provides for less than 12 (but not less than 6) on agreement of the parties.

*Virginia*—Jury of five for misdemeanors. (Va. Code Anno. Sec. 19.1-20.6.)

*Washington*—Wash. Rev. Code Ann. §2.36.050 provides for a six man jury in Justice of Peace court. §35.20.090 makes reference to 6 man jury for municipal courts.

*Wisconsin*—Wis. Stat. Ann. §270.15 (not cited by petitioner) provides for less than 12 on agreement. Wis. Stat. Ann. §957.01 allows parties to stipulate for less than lw. Wis. Stat. Ann. §302.09 may agree to a 6 man jury or less in Justice of Peace court.

*Wyoming*—Wyo. Stat. Ann. §7-427 allows a 6 man jury to be agreed to in lesser courts.

## APPARENTLY SUPERFLUOUS PROVISIONS CITED BY PETITIONER

*Delaware*—Del. Code Ann. Tit. 11, §2701 (Supp. 1966)—States only jurisdiction of Court of Common Pleas for Kent County to hear misdemeanors, with exceptions.

*Illinois*—Ill. Ann. Stat. ch. 78, §20—states only procedure for drawing jurors by lot; ch. 78, §23 states only provisions of jury impaneling act.

*Indiana*—Ind. Ann. Stat. §9-1811 (1956) states only that jury verdict will be in open court and right of defendant to poll jury.

*Kansas*—Kan. Gen. Stat. Ann. 62-1501—states only manner of rendering verdict by jury.

*Michigan*—Mich. Stat. Ann. §28.1191 (1954)—Applies only to justice of peace; jurisdiction; effect of imposition of excessive penalty; imposition of certain fines.

*Mississippi*—Miss. Code Ann. §1202 (1957)—inapplicable as it deals only with appeals, no reference to the jury system.

*Missouri*—Mo. Rev. Stat. 546.390 refers to validity of verdicts, not applicable to question.

*Nebraska*—Here it is apparent that the appellant cited the wrong statutes and constitutional articles. Art. III, sec. 11 has no reference to problem. Art. III, sec. 6 has no reference to problem. Statute 29-2022 not applicable, deals with sequestration of jury. Art. I, sec. 6 and Art. I, sec. 11 do deal with the problem and provide for right to jury trial except in petty offenses.

*Nevada*—Nev. Rev. Stat. §175.480 refers only to polling the jury.

*Ohio*—Ohio Rev. Code Ann. §2945.77 is not applicable, refers to polling the jury.

*South Dakota*—S.D. Code §34.3673—not applicable, refers to the polling of the jury.

It should be clear from the above charts that the criminal administration of many states other than Louisiana would be affected by the decision if the Sixth Amendment jury trial right applies directly to the states. It should also be clear that Louisiana, far from being eccentric in the treatment which it accords to jury trials, is in accord with a substantial number of her sister states.

The fact that the right of trial by jury has been construed in the light of the common law as it existed when the state and federal constitutions were adopted so as to limit it to that class of cases which at common law, or at the time of the adoption of the respective constitutions, were triable by jury, shows that trial by jury is not fundamental. Thus in *Pearson v. Wimbish*, 124 Georgia 701 52 S. E. 751 (1906) it was observed that the phrase "the right of trial by jury shall remain inviolate" found in many state constitutions, means that the right of trial by jury, as it existed in the colonies before the Revolution, should be preserved, but was not to be enlarged; nor was it to be extended to instances where summary trial without a jury was authorized and practiced.

In *Premier Cereal and Beverage Co. v. Pennsylvania Alcohol Permit Board*, 292 Pa. 127, 140 Atl. 858 (1928) the court held that the state constitutional guarantee of trial by jury did not prevent the legislature from providing other tribunals for the trial of offenses created subsequently to the adoption of the Constitution. To the same effect, *Inwood v. State*, 42

Ohio State 186 (1884) and *Tims v. State*, 26 Alabama 165 (1855).

A right which is fundamental is not subject to limitation. It would apply to crimes created after the adoption of the Constitutions as well as those in existence prior thereto, and petty offenses would not be excepted.

If a jury is essential to a fair trial, it can make no difference whether the defendant's trial is for a petty offense or a serious crime, or for a crime created prior to a certain date or after that date.

In *Harvey v. Mississippi*, 340 F.2d 263 (5th C.C. A. 1965), the court, discussing the constitutional right of counsel under the Fourteenth Amendment stated that "the Constitution draws no distinction between loss of liberty for a short period and such loss for a long one."

In *Application of Gault*, 87, S.Ct. 1428 (1967), concerning the right of a juvenile to procedural due process under the Fourteenth Amendment, the Court held that procedural due process under the Fourteenth Amendment was the right of juveniles as well as adults. "Under our Constitution, the condition of being a boy does not justify a kangaroo court." 87 S.Ct. at 1444. It is noteworthy that this Court held that the procedural due process to which a juvenile was entitled included notice, counsel, confrontation, privilege against self-incrimination and right of cross-examination, *but it did not mention jury trial* as a funda-

mental right, citing *Kent v. United States*, 393 U.S. 541. See 87 S.Ct. at 1436.

Therefore, the petty offense exception recognized by the federal courts and the numerous exeeptions to jury trial recognized in all states show the non-fundamental nature of jury trial and prove that a jury is not an essential of a fair trial.

## F. THAT JURY TRIAL HAS MERIT DOES NOT MEAN THAT IT IS INDISPENSABLE TO A FAIR TRIAL

Writing about juries in his work *The Hunting of the Snark*, 42 (1923), Lewis Carroll quipped:

> "The Jury had each formed a different view
> (Long before the indictment was read),
> And they all spoke at once, so that none of them knew
> One word that the others had said."

Lewis Carroll, like many other critics of the jury, obviously did not consider them "sacred cows."

Louisiana, however, does not deny the merits of a trial by jury.

Nevertheless, that trial by jury is meritorious does not mean that it is essential to the fairness of the fact-finding process, or that it is the only fair means of determining facts in a trial.

Alexander Hamilton in Federalist No. 83, pointed out the difference between those who believed in the utility of the jury (the moderates) and those who believed that a jury was absolutely essential (the

extremists). Hamilton's position was that a jury was of great value, but he refused to state that it was essential in a representative republic merely because it was considered of such merit as a defense against the oppressions of an hereditary monarch in England. Speaking of jury trials in *Federalist No. 83*, Hamilton states:

> "*. . . they will remain terminable as heretofore by the State courts only, and in the manner which the State constitutions and laws prescribe* . . . For my part I acknowledge myself to be convinced that even in this State it might be advantageously extended to some cases to which it does not at present apply, and might as advantageously be abridged in others. It is conceded by all reasonable men that it ought not to obtain in all cases. The examples of innovations which contract its ancient limits, as well in these States as in Great Britain, afford a strong presumption that its former extent has been found inconvenient, and give room to suppose that future experience may discover the propriety and utility of other exceptions. I suspect it to be impossible in the nature of the thing to fix the salutary point at which the operation of the institution ought to stop, and this is with me a strong argument for leaving the matter to the discretion of the legislature . . ."

"It certainly sounds not a little harsh and extraordinary to affirm that there is no security for liberty in a Constitution which expressly establishes the trial by jury in criminal cases, because it does not do it in civil also; while it is a notorious fact that Connecticut, which has been

always regarded as the most popular State in the Union, can boast of no constitutional provision for either."

Louisiana also recognizes the value of the right to trial by jury in that she requires it for felonies and capital crimes.

But like the federal courts with their "petty offense" exceptions, and like other states which have carved out many exceptions to the jury trial, Louisiana recognizes that a fair trial may be had without a jury and that the scope of the jury trial right may be limited and liberty still preserved.

Every one of Appellant's arguments (Appellant's brief pp. 21-32) relates to the value, rather than the necessity of a jury. Every one of Appellant's arguments is applicable to the petty offenses which federal courts try without juries. If it is impossible to have a fair trial without a jury of an offense carrying more than a six months' penalty according to Appellant's arguments Appellant's brief pp. 21-32), then it is also impossible to have a fair trial of an offense punishable by less than six months.

Appellant's attempt to connect his arrest with "opposition by parish officials to court-ordered desegregation" (Appellant's brief p. 22) is totally unsupported by the record in this case. His insinuation that the "personal and political leanings of the trial judge" (Appellant's brief p. 23) might have been antagonistic to him is also unsupported by even the minutest shred of evidence.

Had there been any substance to appellant's insinuation that a fair trial was impossible because of the judge's bias, his remedy was to ask for a change of venue under Articles 611 - 614, 623 of the Louisiana Code of Criminal Procedure or to ask the judge to recuse himself as provided in Article 671 (1) of the Louisiana Code of Criminal Procedure.

Instead, appellant made no claim that the judge was biased and produced no evidence to that effect; but he now attacks the judge's impartiality in his brief before this Court, on mere speculation. Surely, the principles of a fair trial should also apply to the state's case. Here appellant is seeking to attack the trial judge's impartiality on the basis of conjecture without allowing the state the benefit of confrontation or cross-examination of any witnesses that appellant might produce.

The value of trial by jury has been debated for many years, and there are many arguments on both sides.

Trial by jury was criticized by Gunnar Myrdal in his work *An American Dilemma* as follows:

> "The jury for the most part, is more guilty of obvious partiality than the judge and the public prosecutor". Myrdal, *An American Dilemma*, p. 552.

Complaints are frequently made as to the efficiency of the jury system as a fact-finding body. See McCarter, *The Jury System: A Twentieth Century View*, 4 Kan. L. Rev. 425 (1926); Sebille, *Trial*

*by Jury*, An Ineffective Survival, 10 American Bar Journal 53, (1924); Howard, *Trial by Jury*, 17 Century 683; Green, *Why Trial by Jury*, 15 American Mercury 316; J. C. McWhorter, *Abolish the Jury*, 57 American Law Review 42; *Trouble with the Jury System, 1 American Inst. of Criminal Law and Criminology*, 959; Elder, *Trial by Jury*, Harper's Monthly Magazine, 156:573.

The historian Trevelyan reports that even earlier, "the English jury system, while it protected our liberties, by no means always increased the fairness of trials". England Under the Stuarts, 22 (1949) Respected scholars of English law have expressed the view that in Sixteenth Century England, in cases in which the Crown was interested, the protection of trial by jury was illusory. Trials for treason were by jury and in most instances, offender was convicted. It is not at all clear that more injustice was done before the Star Chamber than would have been done in trial by jury with the Government exerting its influence on the jury. Radcliffe and Cross, *The English Legal System*, (4th Ed) 1965 p. 108.

Wormser, in his work *The Law*, (Simon and Schuster 1949) p. 275, states that there is much to be said against the jury system, the most severe criticism being the caliber of the juries. He points out the anomoly of having a technical case decided by such an assortment of jurors as a plumber's helper, a cook, an unemployed actor, a window washer, two clerks and six housewives who know nothing about business.

Justice Oliver Wendell Holmes, Jr. on juries: "Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere." Holmes' dissent in *Frank v. Mangum*, 237 U. S. 309, 345 (1915).

It has been pointed out that trial by jury in England, its so-called birthplace, is at a low ebb and that Parliament is constantly creating new offenses which are tried summarily without a jury. *The same writer states that a vast number of trials in the state courts of the United States take place before judges alone and that the popularity of jury trial is waning.* Riave, *Fair and Impartial Trial by Jury in the United States and England*, 50 Amer. Bar Assn. Journal 232, 234, (1964).

In an article in *The Times Picayune*, December 4, 1967, Sec. 2, page 2, it was reported that a Los Angeles, California defendant charged with the murder of six persons elected to be tried without a jury because he feared laymen "might be overwhelmed by the sheer volume of accusations".

McCart, in *Trial by Jury*, (Chilton 1964) p. 16, states that because of the right of defendants in state prosecutions to waive jury trials, only a minority of cases in the United States are tried by jury, and that this testifies to the public's confidence in the integrity of judges. The same author points out (pp. 116-117) that juries, composed of laymen, are required to pass on the manner and extent to which the law, as

explained in the judge's charge, fits the facts, and as such perform the legal function of interpretation and application.

Justice Story's opinion in *U. S. v. Battiste*, 2 Summer's Circ. Ct. Rep. (1835) is quoted by McCart on the question of juries following their emotions instead of the law:

> "In each they have the physical power to disregard the law as laid down to them by the Court. But I deny, that in any case, civil or criminal, they have the moral right to decide the law according to their own notions, or pleasure."

McCart points out (p. 148) that if the law of the case is left to the decision of a jury there can be no consistency in law, as jurors act in the field of emotions present in a trial.

Both Justice Story and McCart disagree with Appellant's eccentric theory that juries are of value because they can be inconsistent, can ignore the law, and can give popular rather than lawful verdicts. "When the jury appears in this somewhat lawless role, it is time to inquire whether the law does not need revision." Kaplan, Trial by Jury, Talks on American Law (Vintage Books 1961), pp. 52-53.

Some drawbacks of the jury system are presented in Kircheimer, *Political Justice* (Princeton University Press, 1961), pp. 219-224, wherein the author points out that at best the jury is a "cumbersome relic" having "the quality of an echo, throwing back the most forceful sounds it receives." See also Kaplan, *op. cit: supra*, at 49.

Osborn, in *The Mind of the Juror*, (Boyd Printing Co. 1938) points out that twelve-man juries are too large to be efficient, that the requirement of unanimous verdicts defeats justice, that juries are not democratic in practice, as one or two men on the jury dominate and do the thinking for the others, that juries make undesirable compromises, that they are subject to prejudices and that they do not understand the principles of circumstantial evidence.

> "The jury has been severely criticized by the positivist school of criminology. Garofalo, Criminology 355-64 (Miller transl. 1914); Ferri, Criminal Sociology 485-97 (Kelly & Lisle transl. 1917). As a result it has been replaced in many civil law jurisdictions by professional and lay judges deliberating together." Silving, Essays on Criminal Procedure (Dennis & Co. 1964) p. 54 n. 209.

Silving points out that the nature of the function of the jury has been obscured in the course of its development. Today, a jury must exercise supra-rational capacities of moral judgment and mystically determine unsolvable quasi-scientific issues, as for example in *Durham v. U.S.*, 214 F.2d 862 (1954) the scientifically unanswerable question of whether an act is the product of a mental defect. Such a finding by a jury is the finding of something that can't be found. Such questions should be decided by specialist—judges. Silving, *op. cit. supra*, pp. 363-364.

In *Singer v. U.S.*, 380 U.S. 24, 35 (1965) this Court stated that although the Constitution has established trial by jury as the preferable mode of dis-

posing issues of fact, "as with any mode that might be devised to determine guilt, trial by jury has its weaknesses and the potential for misuse." The Court's language leads to the inescapable conclusion that although the Constitution regards trial by jury as "most likely" to produce a fair result, it is not the exclusive or essential mode and, under some circumstances, trial by jury might even produce unfair results.

In the Challenge of Crime in a Free Society, p. 145, the President's Commission on Law Enforcement states:

> "In 10 States sentences are fixed by juries rather than by judges. Data indicate that this is a poor practice. Jurors do not and cannot have the expertise to assess rationally the correctional needs of offenders; and juries, because of their size and their position of being half in and half out of the court system, are inappropriate recipients of sentencing information.
>
> "The extent of the failings of jury sentencing were vividly revealed in a recent survey by the Atlanta Crime Commission, which showed that in that city for some offenses first offenders received more severe sentences on the average than hardened recidivists."

The same Commission, while recommending that each State furnish consel for lesser offenses, also recommends that summary non-jury process be retained undisturbed for lesser offenses. Challenge of Crime in a Free Society, pp. 129, 151. The same report on p. 275 points out the necessity for expertise rather than "laymanship" in criminal administration.

Finally, in 5 The Reference Shelf No. 6, The Jury System (compiled by Julia E. Johnson, 1929) wherein the "pros and cons" of the jury system and writings thereon are compiled, the following arguments are presented against the jury system:

It has outlived its original purpose, as ours is a representative government with the majority of state judges elected by the people or by their elected representatives (N.B. Louisiana judges are all elected by the people and are not named "by the Crown", as appellant's quote from Blackstone would imply). The jury is based on antiquity and is an obstruction to more progressive methods. It is not an efficient trier of facts, the intellectual characteristics and the training of the average juror being low. The jury is ruled by prejudice rather than reason. The jury system is responsible in large measure for the delays in our court systems. The jury is expensive and wasteful. The judge, because of his expertise and sense of responsibility, is superior to the jury as a trier of fact.

The above criticisms are presented to show that the jury is not the model of perfection that appellant's "glittering generalities" attempt to make it.

The jury system has drawbacks, as many authorities have stated. And it also has its salutory effects. This appellee does not deny, but affirms that the scope of jury trial is subject to modification by the States, and that the extent of modification existing in the Louisiana jury trial system is entirely consistent with the maintenance of liberty and a fair trial.

G. RETROACTIVITY

Louisiana recently adopted its Code of Criminal Procedure, of which Art. 779 is a part, after many years of research and study by leading experts in the field of criminal procedure, under the supervision of the Louisiana State Law Institute.

A determined and sincere effort to comply with this Court's Fourteenth Amendment jurisprudence was made in the enactment of the Louisiana Code of Criminal Procedure as will appear from the following statement made by Prof. Dale E. Bennett of the Louisiana State University School of Law, one of the drafters of the Code of Criminal Procedure:

> "At the time when all members of the bar are faced with the responsibility of defending indigent defendants, it is particularly important that the rules governing the trial of criminal cases be stated as fully and clearly as possible. At the same time the code procedures must be sufficiently flexible to permit trial judges to adapt them to the special circumstances and necessities of particular cases. A definite attempt has been made to provide a statement in the new Code of many rules which are presently ascertainable only by a careful search of key Supreme Court decisions and miscellaneous statutes. The filling of such code gaps and hiatuses, so that the basic procedures are stated in a single volume, should be of substantial assistance to the lawyer who is called upon to defend only an occasional criminal case. *Another general objective of the new Code has been to adapt Louisiana's procedures to those federal requirements which apply to the states*

*via the fourteenth amendment.* There has also been a consideration of recently developed rules of other states which are aimed at providing more practical and fairer trial procedures. At the same time it was important to retain Louisiana's present basic procedures, and no innovation was adopted without a careful check of its practicality, and also of its fairness to the defendant and to the state. One constant aim was the elimination of rigid technical requirements which served no other purpose than to trip an inexperienced defense lawyer or to harass a busy district attorney." Bennett, The 1966 Code of Criminal Procedure, 27 La. L Rev. 175 (1966) (Emphasis supplied)

"Trial by jury has never been affirmed to be a necessary requisite of due process of law." *Maxwell v. Dow*, 176 U.S. at 603 (1899). This Court has consistently held that trial by jury is not required by the Fourteenth Amendment and it has never been deviated from that position, approving its stand thereon in many subsequent decisions which have been herein above cited.

In reliance upon this Court's consistent position for many years that the Fourteenth Amendment does not require a state to provide trial by jury, Louisiana, since 1898, a period of sixty nine years, has provided for the trial of misdemeanors by a judge without a jury; and since 1852 it has provided for the modification of the twelve man unanimous jury required under the Sixth Amendment. This has determined the size of its courthouses, the number of judges, district at-

torneys and other officials necessary for handling criminal matters. (See statistics in Appendix D.) A century of jurisprudence by this Court that the Sixth Amendment does not apply to jury trials in state courts should not be shrugged off with the attitude that "that's just Louisiana's tough luck". If this Court should determine that the Sixth Amendment applies directly to jury trials in state criminal proceedings, then the conviction of numerous felons by less than twelve man unanimous juries and the conviction of all persons charged with misdemeanors would be invalidated if such a decision would apply retroactively. The administration of criminal justice in Louisiana, as well as in those states which allow trial by judge of misdemeanors, providing for more than six months in jail and those states defining petty crimes in a different manner from the federal definition, and those states providing for less than twelve man unanimous juries, would be thrown into chaos.

In view of the rising crime rate as shown by the latest F. B. I. Crime Report (a 15% increase over last year and in the city of New Orleans a 30% increase over last year), this would indeed be tragic for the citizens of this country.

Accordingly, it is submitted that this Court should not apply the Sixth Amendment jury trial right to the states, but that if it does, it should clearly enunciate the principle that such right does not apply retroactively. See *Johnson v. New Jersey*, 364 U.S. 719 (1966).

## VI. CONCLUSION

In view of the foregoing, it is respectfully submitted:

(1) That appellant's prosecution met "petty offense" standards under *Cheff v. Schakenberg*, supra, and was therefore not entitled to a jury trial under the Sixth Amendment even if that Amendment applied;

(2) That in any event the Sixth Amendment jury trial right does not apply directly to the states;

(3) That if the Sixth Amendment jury trial right applied, all states would be constitutionally obliged to try all offenses that did not need federal "petty offense" standards by twelve-man unanimous juries;

(4) That trial by jury is not essential to a fair trial under the due process clause of the Fourteenth Amendment;

(5) That it is not essential to liberty that Louisiana provide the right to jury trials in simple battery prosecutions; and accordingly, appellant's conviction and the judgment of the state court below should be affirmed.

Respectfully submitted,

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## CERTIFICATE

I, William P. Schuler, a member of the bar of the United States Supreme Court, hereby certify that a copy of the above and foregoing brief has been served on counsel for Appellant:

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by placing same in the United States mail, properly addressed to them, with sufficient postage thereto annexed.

New Orleans, La., this ____ day of December, 1967.

William P. Schuler

## APPENDIX A

**Amendment XIV.—Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Code of Criminal Procedure—Louisiana**

**Art. 779. Trial of misdemeanors**

A defendant charged with a misdemeanor shall be tried by the court without a jury.

*Source:* Former R.S. 15:340; Const. Art. I, § 9, Art. VII, § 41.

Official Revision Comment

(a) This article is merely a stylistic revision of former R.S. 15:340.

(b) The term "misdemeanor" is defined in Art. 933 (4); therefore, the definition contained in former R.S. 15:341 is not retained in the above article. See also, the definition of "misdemeanor" in R.S. 14:2.

**Art. 780. Right to waive trial by a jury**

A defendant charged with an offense neither capital nor necessarily punishable by imprisonment at hard labor may waive a trial by jury and elect to be tried by the court. At the time of arraignment, the defendant in such cases shall be informed by the court of his right of waiver and election.

*Source:* Former R.S. 15:342, 15:259.

Official Revision Comment

(a) This article is simply a converse restatement of former R.S. 15:342.

(b) The last portion of the article is taken from former R.S. 15:259, which in the 1928 Code of Criminal Procedure was placed among the articles dealing with arraignment.

(c) Const. Art. VII, § 41 seems to require a five-man jury trial in cases not necessarily punishable by hard labor since the provision uses the word "shall". A serious question of the validity of the waiver would arise, except for the fact that Const. Art. VII, § 42 provides that district judges have authority to try all cases not necessarily punishable by hard labor "when the jury is waived by the defendant."

(d) This article makes no mention of the time when the defendant must elect nor of the situation in which the defendant wishes to revoke his waiver. The provisions of this article have been operative since 1921, and there has been no problem with such matters. They have been handled satisfactorily under the general authority of courts to regulate their business.

**Art. 782. Number of jurors composing jury; member which must concur**

Cases in which the punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. Cases in which the punishment is necessarily at hard labor shall be tried by a jury composed of twelve jurors, of whom must concur to render a verdict. Cases in which the punishment may be imprisonment at hard labor, shall be tried by a jury composed of five jurors, all of whom must concur to render a verdict. Except as provided in Article 780, trial by jury may not be waived.

*Source:* Const. Art. VII, § 41; former R.S. 15:337-15:339, 15:342.

Official Revision Comment

(a) This article is taken substantially from the constitutional source provision. It condenses in terse clear terms all that is stated in former R.S. 15:337, 15:338, 15:339 and 15:342.

(b) In 1962 and 1964, proposals to amend the constitution to abolish the five-man jury were defeated in the legislature. The 1962 proposal was recommended by the Louisiana State Law Institute, and the 1964 proposal was sponsored by the Louisiana District Attorneys' Association.

(c) The supreme court ruled in *State v. Stanford*, 204 La. 439, 15 So.2nd 817 (1943), that the number of jurors to try a case is determined by the gravity or nature of the crime charged, and not by the verdict returned of a lesser offense.

## Louisiana Constitution, Article 1, Sec. 9

**§ 9. Criminal prosecutions; speedy public trial; jury; venue; witnesses; counsel; indictment and information; double jeopardy**

Section 9. In all criminal prosecutions the accused shall have the right to a speedy, public and impartial trial in accordance with the provisions of this constitution. All trials shall take place in the parish in which the offense was committed, unless the venue be changed; except that the Legislature may provide for the venue and prosecution of offenses when one of the acts constituting an offense or an element of the offense occurs in a parish in this state and other acts or elements thereof occur out of the parish or state, or when an offense is committed in this state but the exact place of the commission of the offense in this state cannot be established. The Legislature may provide for the venue and prosecution of offenses committed within 100 feet of the boundary line of a parish. The accused in every instance shall have the right to be confronted with the witnesses against him; he shall have the right to defend himself, to have the assistance of counsel, and to have compulsory process for obtaining witnesses in his favor. Prosecution shall be by indictment or information; but the Legislature may provide for the prosecution of misdemeanors on affidavits; provided, that no person shall be held to answer for capital crime, unless on a presentment or indictment by a grand jury, except in cases arising in the militia when in actual service in time of war or public danger. No

person shall be twice put in jeopardy of life or liberty for the same offense, except on his own application for a new trial, or where there is a mistrial, or a motion in arrest of judgment is sustained. (As amended Acts 1962, No. 528, adopted Nov. 6, 1962.)

**Louisiana Constitution, Art. 7 § 41**

**§ 41. Selection of jurors; women jurors; trial by judge; trial by jury**

Section 41. The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service. All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.

**§ 42. Grand jury; district judges, authority in criminal cases**

Section 42. A grand jury of twelve, nine of whom shall constitute a quorum and must concur to find an indictment, shall be empanelled in each parish

twice in each year, and shall remain in office until a succeeding grand jury shall have been empanelled, except in the parish of Cameron, in which at least one grand jury shall be empanelled each year.

The district judges shall have authority to try at any time misdemeanors, and, when the jury is waived by the defendant, all cases not capital or necessarily punishable at hard labor, and to receive pleas of guilty in all cases less than capital.

**Louisiana Revised Statutes, Title 14.**

**§ 2. Definition**

In this Code the terms enumerated shall have the designated meanings:

(1) "Another" refers to any other person or legal entity, including the state of Louisiana or any subdivision thereof.

(2) "Anything of value" must be given the broadest possible construction, including any conceivable thing of the slightest value, movable or immovable, corporeal or incorporeal, public or private, and including transportation, telephone and telegraph services, or any other service available for hire. It must be construed in the broad popular sense of the phrase, and not necessarily as synonymous with the traditional legal term "property."

(3) "Dangerous weapon" includes any gas, liquid or other substance or instrumentality, which, in the manner used, is calculated or likely to produce death or great bodily harm.

(4) "Felony" is any crime for which an offender may be sentenced to death or imprisonment at hard labor.

(5) "Foreseeable" refers to that which ordinarily would be anticipated by a human being of average reasonable intelligence and perception.

(6) "Misdemeanor" is any crime other than a felony.

(7) "Person" includes a body of persons, whether incorporated or not.

(8) "Property" refers to both public and private property, movable and immovable, and corporeal and incorporeal property.

(9) "Public officer," "public office," "public employee" or "position of public authority" means and applies to any executive, ministerial, administrative, judicial, or legislative officer, office, employee or position of authority respectively, of the state of Louisiana or any parish, municipality, district, or other political subdivision thereof, or of any agency, board, commission, department or institution of said state, parish, municipality, district, or other political subdivision.

(10) "State" means the state of Louisiana, or any parish, municipality, district, or other political subdivision thereof, or any agency, board, commission, department or institution of said state, parish, municipality, district or other political subdivision.

(11) "Whoever" in a penalty clause refers only to natural persons insofar as death or imprisonment

is provided, but insofar as a fine may be imposed "whoever" in a penalty clause refers to any person. As amended Acts 1962, No. 68, § 1.

### § 33. Battery defined

Battery is the intentional use of force or violence upon the person of another; or the intentional administration of a poison or other noxious liquid or substance to another.

### § 34. Aggravated battery

Aggravated battery is a battery committed with a dangerous weapon.

Whoever commits an aggravated battery shall be imprisoned, with or without hard labor, for not more than ten years.

### § 35. Simple battery

Simple battery is a battery, without the consent of the victim, committed without a dangerous weapon.

Whoever commits a simple battery shall be fined not more than three hundred dollars, or imprisoned for not more than two years, or both.

## APPENDIX "B"

STATE OF DELAWARE
Office of the Attorney General

November 20, 1967

Honorable Jack P. F. Gremillion
Attorney General
Department of Justice
Baton Rouge, Louisiana 70804

Dear Jack:

In answer to your recent letter requesting information pertaining to your forthcoming case of Duncan v. Louisiana in the United States Supreme Court, I can advise you of the following.

The State of Delaware does not require that a jury trial be granted in all cases involving misdemeanors. In this State we have a Justice of the Peace System and these Justice of the Peace Courts have jurisdiction over most, but at all, misdemeanors. There is no trial by jury before a Justice of the Peace.

It is our law, however, that in all cases where a Justice of the Peace has jurisdiction over a misdemeanor, the defendant has the right to elect whether to have his case heard before the Justice of the Peace or to have it heard before the County Court of Common Pleas, which also has concurrent jurisdiction over misdemeanors. In the lower two of our three counties, the Court of Common Pleas is a court of record and a trial by jury is available if not waived by the defendant. In these two counties, therefore, a defendant charged with a criminal misdemeanor does

have a right or opportunity to have his case originally heard before a jury if he so desires. It is not mandatory that this be accomplished, however, and the decision is left to the individual defendant.

In our third county, New Castle County, the Court of Common Pleas is not a court of record although it still has concurrent jurisdiction with Justice of the Peace Courts over misdemeanors. In this county, if the defendant elects to have his case heard before the Court of Common Pleas, then it is accomplished without a jury. However, in either case, that is where the trial is before the Justice of the Peace or the Court of Common Pleas, an appeal lies to the Superior Court, in which instance the matter is heard de novo and a jury trial is granted to the defendant unless he specifically waives the same in writing.

These Justice of the Peace Courts and the Municipal Court of the City of Wilmington in certain cases, have jurisdiction to oppose imprisonment for more than 6 months, and as previously stated there is no right to a jury trial in these courts.

In answer to your request for the definition of the term "misdemeanor", I can best answer by offering to you the definition of a felony. In this State, all crimes are misdemeanors unless specifically in the criminal statute it is stated that the particular offense constitutes a felony. If the given statute does not define the offense setforth therein as a felony, then it is automatically a misdemeanor.

In this State it is necessary for a conviction or

an acquittal that the unanimous consent of all twelve members of the jury panel to be obtained. If all twelve members of the jury cannot agree as to either conviction or acquittal, then a hung jury and technically, a mistrial is declared by the court and the case is then tried again at the next term of court before a new jury panel.

Trusting that this will be of assistance to you, and with best wishes for the success of your efforts, I am

Sincerely yours,

/s/ DAVID P. BUCKSON
Attorney General

DPB/GCB/fcp

THE ATTORNEY GENERAL
200 One Charles Center
Baltimore, Md. 21201

November 17, 1967

Honorable Jack P. F. Gremillion
Attorney General of Louisiana
104 Supreme Court Building
New Orleans, Louisiana 70112

Re:

Jury Questionnaire
Gary Duncan v. State of Louisiana
Appeal to United States Supreme Court
No. 410

Dear General:

Receipt is hereby acknowledged of your letter with reference to the above captioned matter. In accordance with your request, I am happy to supply the following information concerning the requirements for trial by jury in misdemeanor cases in our State.

(a) Maryland does not require a trial by jury in any case involving a misdemeanor. Except for motor vehicle cases, Maryland does require that an accused be afforded a right to a jury trial if he so desires.

(b) A trial by jury is not permitted in motor vehicle cases. It may be well to note that some misdemeanors regarding motor vehicle violations do carry a penalty of more than six months' imprisonment.

(c) The local courts do have authority to try misdemeanors without a jury.

The municipal court and local trial magistrates have authority to try an accused for certain misdemeanors, but only after the accused has been advised of his rights to a trial by jury and has elected to be tried by the court. As previously noted, the above does not apply to traffic violations.

(d) Definition of a misdemeanor—The term "misdemeanor" contemplates all offenses which do not amount to a common law or statutory felony. Maryland Law Encyclopedia, Volume 7, Criminal Law, Section 7.

(e) Unanimous vote, normally by twelve jurors, is required for a conviction. Rule 758 of the Maryland Rules of Procedure specifically requires the unanimous vote by all jurors for conviction. This rule simply echoes the constitutional requirement found in Article 21 of the Maryland Declaration of Rights. Normally, the jury in Maryland is composed of twelve individuals. Rule 743, however, provides that the jury may consist of any number less than twelve upon the written stipulation of the parties and approval of the court.

It is a pleasure to have been of assistance in this matter.

Yours very truly,

/s/ FRANCIS B. BURCH
Attorney General

FBB:mem

State of Nebraska
DEPARTMENT OF JUSTICE
Lincoln

November 14, 1967

Hon. Jack P. F. Gremillion
Attorney General
Supreme Court Bldg.
301 Loyola Avenue
New Orleans, Louisiana 70112

Re:

Gary Duncan v. State of Louisiana
Appeal to U. S. Supreme Court
No. 410

Dear General:

The Nebraska rule regarding the right to a trial by jury is best set forth in the 1964 case of State v. Lookabill, 176 Neb. 254, 125 N. W. 2nd 695, wherein our court stated:

". . . .

"The defendant contends that the failure of the police magistrate to grant him a jury trial upon his demand was such an error as to invalidate his conviction. The controlling rule is stated in State v. Amick, 173 Neb. 770, 114 N.W. 2d 893, wherein it is said: 'The constitutional provision that the right of trial by jury should remain inviolate has been construed by this court to mean that it should remain as it was at the time of the adoption of the Constitution. The offense involved in the present case did not exist at that time and, consequently, it being a petty

offense, the right to a jury trial is not within the scope of the constitutional guaranty. Under such circumstances, the matter of a jury trial is a legislative matter. The Legislature, by section 26-183, R.R.S. 1943, has specifically provided for jury trial in all cases "except criminal cases arising under city or village ordinances." This is clearly within the province of the Legislature to do and controls the disposition of the present case.' The defendant was not entitled to a jury trial in the police court on an offense charged under the city ordinance. This is so even though the person charged would be entitled to a jury trial if prosecuted under a state statute for the same offense.

". . .

The rule regarding waiver of jury trial is set forth in the 1967 case of State v. Carpenter, 181 Neb. 639, 150 N.W. 2nd 129. In that case our court held that the right to a jury trial is personal to the defendant, and the state is without power to require one if the defendant wishes to waive it.

The case of State v. Amick, cited in the quotation above, contains this further explanation of our law: "A person tried for the violation of a city ordinance is not entitled to a jury trial, although the ordinance is but a reiteration of the provisions of a statute covering the same offense, and although the person charged would be entitled to a jury trial if prosecuted under the statute."

An individual is entitled to a jury trial in misdemeanor cases involving violations of state statutes.

A felony under state law includes all offenses for which an individual *may* be sentenced to the penitentiary, whether or not he is actually sentenced to the penitentiary. All other cases are misdemeanors.

Verdicts must be unanimous in criminal cases.

Although a defendant is entitled to a jury in all cases which are misdemeanors under the state law, we have a special provision for the trial of misdemeanors in which the punishment cannot exceed three months imprisonment or a fine of three hundred dollars, or both. This would cover more than 90% of our misdemeanors. In such cases the defendant may demand a jury but if no jury is demanded the cause is tried by the judge alone. If a jury is demanded in those cases it is only a six man jury. Furthermore, if the defendant consents, the cause may be tried before a jury of any number of men more than two and less than six. As a matter of actual practice, a jury is rarely demanded. In my seven years in the private practice in a small community, I only recall a jury having been demanded on one occasion. Also, I just talked with the judge of one our busier inferior courts here in Lincoln, and it has been more than five years since a jury was demanded in his court.

If additional information is needed please write me further.

Very truly yours,

/s/ CLARENCE A. H. MEYER
Attorney General

CAHM;dnj

THE STATE OF NEW HAMPSHIRE
Attorney General
Concord

November 15, 1967

Honorable Jack P. F. Gremillion
Department of Justice
Baton Rouge, Louisiana 70804

Dear General:

Your letter to Mr. Pappagianis of November 10, 1967 has been referred to me for an answer. The answers to questions a, b and c are as follows:

In New Hampshire all misdemeanors which are punishable by a fine not exceeding one thousand dollars or imprisonment not exceeding one year, or both, are tried in a district court without a jury. RSA 502-A:11. The municipal court system, which is being gradually eliminated, has jurisdiction without a jury over all misdemeanors which are punishable by a fine not exceeding five hundred dollars or imprisonment not exceeding one year, or both. RSA 502:18. This procedure is authorized by Pt. 2, Art. 77 of the Constitution of New Hampshire which reads as follows:

> "[Art.] 77. [Jurisdiction of Justices in Civil Causes.] The general court are empowered to give to justices of the peace jurisdiction in civil causes, when the damages demanded shall not exceed one hundred dollars and title of real estate is not concerned; but with right of appeal, to either party, to some other court. And the general court are further empowered to give to police courts original jurisdiction to try and de-

termine, subject to right of appeal and trial by jury, all criminal causes wherein the punishment is less than imprisonment in the state prison."

A defendant may, therefore, have a jury trial in misdemeanor cases, but he must first submit to a trial in a district or municipal court and then appeal to superior court. The following cases define the right to a jury trial in New Hampshire:

*State v. Despres*, 107 N.H. 297; *State v. Green*, 105 N.H. 260;

*State v. Ring*, 106 N.H. 509; *Wilmarth v. King*, 74 N.H. 512;

*State v. Gerry*, 68 N.H.495; *State v. Jackson*, 69 N.H. 511;

*State v. Griffin*, 66 N.H. 326; *State v. Rollins*, 8 N.H. 550, 559-565. See 39 Harvard Law Review 925, 929.

The answer to question d is that in New Hampshire any crime punishable by one year imprisonment or less is a misdemeanor. See Pt. 2, Art. 77 of the Constitution of New Hampshire and RSA 601:1.

The answer to question e is that New Hampshire does not have any jury trials in the municipal or district courts. All cases which are appealed to the superior court are tried by a jury of twelve persons, unless a jury is waived. Unanimity is required in a jury verdict.

I enclose a copy of the latest report of our Judicial Council indicating that in 1966 51,197 criminal

cases were tried without a jury in our municipal and district court system and that there were 562 appeals to the superior court where the defendant was entitled to a jury trial.

Very truly yours,

/s/ G. WELLS ANDERSON
Assistant Attorney General

GWA:blf

Enclosure

# THE STATE OF NEW HAMPSHIRE
## Judicial Council

July 21, 1967

Memorandum

Subject:

A comparison of a Statistical Compilation showing the work of the District and Municipal Courts for the year ending 1966 with the 10-year average of cases (1956-1965) and a comparison of 1965 with those of 1966.

To:

Members of the Council

This Council has since 1948 collected and compiled Municipal Court statistics on an annual basis. On July 1, 1964, 37 Municipal Courts were established and constituted District Courts. The attached compilation sets forth the work of the 37 District Courts and the 37 remaining Municipal Courts for the year 1966.

The juvenile cases showed a continual annual increase for the 6-year period commencing 1959 through 1965. When they reached an all-time peak of 1,934 cases. The 1966 compilation shows a total of 1,801 Juvenile Cases—a decrease of 133 cases. The principal reason for this decrease results from the enactment of legislation in 1965 which reduced the juvenile age from 18 to 17 years of age.

The total number of cases as reported for the year 1966, with the exception of small claims, continues to show an increase over the average number

# THE STATE OF NEW HAMPSHIRE
## JUDICIAL COUNCIL
## Statistics On Work of District and Municipal Courts—1966

| COURT | TOTAL ALL CASES | CRIMINAL CASES | | | | | | | | | | JUVENILE CASES | | | | SMALL CLAIMS | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Criminal Juvenile Small Claims Civil | Total Criminal Cases | Felonies | Misdemeanors | Drunkenness | Motor Vehicle: Parking and Local Ordinances | Motor Vehicle: State Motor Vehicle Laws | Respondent Pled Not Guilty. | Respondent Found Not Guilty | Nol Prossed | Appealed | Total Juvenile Cases | Neglected Children | Delinquent Children | Transferred to Superior Court | Pending 12/31/65 | Entered | Judgment Entered After Hearing | Judgment Entered on Default | Otherwise Disposed of | Pending 12/31/66 | Pending 12/31/65 | Entered | Tried or Heard |
| 1. Portsmouth | 1,630 | 1,337 | 51 | 1,286 | 66 | 158 | 897 | 72 | 8 | 46 | 11 | 55 | 17 | 38 | | 7 | 177 | 6 | 59 | 107 | 12 | 2 | 61 | |
| (m) New Castle | 93 | 92 | | 92 | | 55 | 34 | 5 | 1 | 1 | | | | | | | 1 | | 1 | | | | | |
| (m) Rye | 228 | 218 | 2 | 216 | 1 | 45 | 115 | 15 | 7 | 8 | 1 | 5 | 1 | 4 | 2 | | 5 | 2 | | 3 | | | | |
| 2. Hampton | 2,067 | 1,927 | 8 | 1,919 | 134 | 82 | 1,289 | 127 | 19 | 140 | 32 | 44 | 1 | 43 | | | 69 | 4 | 17 | 48 | | | 27 | |
| (m) Seabrook | 371 | 323 | 7 | 316 | 10 | 5 | 194 | 56 | 11 | 31 | 6 | 3 | | 3 | | | 44 | 7 | 6 | 31 | | | 1 | |
| 3. Exeter | 787 | 496 | 14 | 482 | 15 | 31 | 353 | 63 | 9 | 7 | 17 | 13 | 1 | 12 | | 6 | 216 | 29 | 38 | 155 | | 6 | 62 | |
| (m) New Market | 136 | 118 | 1 | 117 | 3 | 22 | 70 | 26 | 9 | 3 | 3 | 8 | 1 | 7 | | | 10 | 3 | | 7 | | | | |
| (m) Epping | 223 | 207 | 1 | 206 | 2 | 37 | 157 | 23 | 7 | | 1 | 3 | | 3 | | | 12 | 1 | 4 | 7 | | | 1 | |
| 4. Derry | 869 | 650 | 11 | 639 | 6 | 77 | 405 | 98 | 29 | 14 | 6 | 33 | 1 | 32 | | 4 | 155 | 3 | 42 | 98 | 16 | | 31 | |
| 5. Auburn | 421 | 386 | 7 | 379 | 6 | 21 | 290 | 45 | 5 | 13 | 4 | 5 | | 5 | | | 19 | 3 | 5 | 11 | | 3 | 11 | |
| (m) Northwood | 89 | 60 | | 60 | | | 51 | 3 | 2 | | 2 | | | | | | 29 | | | 29 | | | | |
| 6. Salem | 1,357 | 1,202 | 23 | 1,179 | 23 | 59 | 957 | 158 | 10 | 63 | 19 | 25 | | 25 | 1 | 3 | 86 | 24 | 26 | 39 | | 3 | 44 | 1 |
| 7. Plaistow | 857 | 648 | 14 | 634 | 7 | 57 | 485 | 54 | 18 | 28 | 1 | 5 | 2 | 3 | | | 174 | 42 | 19 | 113 | | | 30 | 1 |
| 8. Dover | 1,843 | 1,703 | 39 | 1,664 | 122 | 702 | 879 | 150 | 10 | 9 | 68 | 29 | 7 | 22 | | | 76 | 42 | 34 | | | | 35 | 2 |
| 9. Rochester | 1,425 | 1,269 | 18 | 1,251 | 36 | 97 | 987 | 113 | 6 | 24 | 17 | 31 | 4 | 27 | | 5 | 101 | 11 | 49 | 39 | 7 | | 24 | |
| (m) Farmington | 235 | 198 | 8 | 190 | 16 | 2 | 118 | 29 | 1 | 4 | 3 | 24 | | 24 | 1 | | 13 | | 6 | 7 | | | | |
| 10. Somersworth | 512 | 342 | 15 | 327 | 18 | 25 | 216 | 23 | 1 | 11 | 8 | 22 | 1 | 21 | | 1 | 136 | 10 | 33 | 92 | 2 | | 12 | |
| (m) Rollinsford | 211 | 203 | 3 | 200 | 6 | 32 | 104 | 44 | 16 | 8 | 9 | 6 | | 6 | 1 | | 2 | | | 2 | | | | |
| 11. Durham | 459 | 453 | | 453 | 5 | 51 | 315 | 61 | 5 | 10 | 9 | 2 | | 2 | | | 4 | | 4 | | | | | |
| 12. Laconia | 2,241 | 1,865 | 18 | 1,847 | 187 | 241 | 953 | 223 | 22 | 61 | 21 | 108 | 4 | 104 | 1 | 29 | 183 | 7 | 30 | 170 | 5 | 22 | 85 | 9 |
| (m) Alton | 232 | 212 | | 212 | 2 | | 179 | 15 | 4 | 3 | 2 | 1 | | 1 | | 3 | 19 | 12 | 1 | 7 | 2 | | | |
| (m) Belmont | 359 | 355 | 8 | 347 | 3 | | 322 | 14 | 2 | 14 | 1 | 2 | | 2 | | | 2 | 1 | 1 | | | | | |
| (m) Meredith | 384 | 347 | 3 | 344 | 2 | 6 | 285 | 29 | 1 | 1 | 1 | 19 | 6 | 13 | | | 18 | 4 | 14 | | | | | |
| (m) Tilton | 255 | 235 | 1 | 234 | 11 | | 193 | 42 | 8 | 9 | | 7 | | 7 | | | 12 | 4 | 8 | | | | 1 | |
| 13. Conway | 634 | 449 | 6 | 443 | 13 | 38 | 270 | 34 | 8 | 39 | 6 | 27 | 1 | 26 | | 33 | 136 | 2 | 42 | 107 | 18 | 14 | 22 | |
| 14. Ossipee | 372 | 314 | 9 | 305 | 6 | 8 | 253 | 32 | 6 | 12 | 7 | 7 | | 7 | | 23 | 43 | 15 | 29 | 22 | | | 8 | |
| 15. Wolfeboro | 378 | 230 | 20 | 210 | 3 | 3 | 106 | 46 | 10 | 15 | 1 | 16 | 1 | 15 | | 2 | 125 | 1 | 1 | 97 | 28 | 4 | 7 | |
| 16. Concord | 3,545 | 2,951 | 30 | 2,921 | 164 | 908 | 1,879 | 116 | 27 | 113 | 14 | 78 | 7 | 71 | | 30 | 180 | 5 | 32 | 146 | 27 | 239 | 336 | 1 |
| (m) Allenstown | 41 | 41 | | 41 | | | 27 | 8 | | 3 | | | | | | | 13 | 2 | 2 | 9 | | | 1 | |
| (m) Hooksett | 574 | 558 | 7 | 551 | 18 | 1 | 539 | 40 | 8 | 14 | 5 | 2 | | 2 | | | 4 | | 1 | 2 | 1 | | | |
| (m) Loudon | 76 | 68 | | 68 | 5 | 1 | 52 | 14 | | 1 | | 4 | | 4 | | | 9 | 2 | 5 | 2 | | | 2 | |
| (m) Pembroke | 97 | 76 | 2 | 74 | 22 | 1 | 53 | 8 | 2 | | 1 | 10 | 4 | 6 | | | 5 | | 2 | 3 | | | 2 | |
| (m) Pittsfield | 282 | 270 | 2 | 268 | 4 | 39 | 170 | 30 | 5 | 14 | 3 | 5 | | 5 | | | 5 | | 2 | 3 | 1 | | 2 | |
| 17. Franklin | 1,451 | 1,253 | 12 | 1,241 | 47 | 91 | 976 | 78 | 23 | 16 | 22 | 30 | 8 | 22 | 4 | | 135 | 11 | 109 | 15 | | | 33 | |
| (m) New London | 98 | 94 | 1 | 93 | | 16 | 56 | 4 | 1 | 1 | | | | | | | 4 | 4 | | | | | | |
| 18. Henniker | 287 | 245 | 2 | 243 | 3 | 31 | 122 | 21 | 6 | 10 | 2 | 20 | 1 | 19 | | | 20 | 1 | 11 | 7 | 1 | 1 | 2 | |
| 19. Manchester | 12,734 | 11,337 | 330 | 11,007 | 1,529 | 5,664 | 3,646 | 839 | 170 | 444 | 103 | 635 | 28 | 607 | 3 | 34 | 320 | 50 | 120 | 123 | 61 | 86 | 442 | 5 |
| (m) Bedford | 357 | 343 | 3 | 340 | 2 | 54 | 276 | 42 | 19 | 2 | 8 | 2 | | 2 | | | 12 | 7 | 1 | 4 | | | | |
| 20. Nashua | 5,555 | 4,754 | 90 | 4,664 | 338 | 1,288 | 2,441 | 216 | 48 | 205 | 11 | 197 | 25 | 172 | | 4 | 259 | 6 | 122 | 120 | 15 | 12 | 345 | 8 |
| (m) Merrimack | 495 | 421 | 3 | 418 | | 14 | 370 | 22 | 9 | 7 | 1 | 12 | | 12 | 1 | 1 | 57 | 16 | 13 | 24 | 5 | | 5 | |
| (m) Pelham | 144 | 128 | 1 | 127 | 1 | 16 | 81 | 6 | 2 | 6 | 1 | 1 | | 1 | | 1 | 15 | 9 | | 7 | | | | |
| 21. Milford | 855 | 727 | 15 | 712 | 9 | 59 | 556 | 92 | 8 | 41 | 7 | 17 | 3 | 14 | | | 69 | 10 | 14 | 42 | 3 | 3 | 42 | |
| (m) Wilton | 241 | 206 | 6 | 200 | | 9 | 177 | 11 | 3 | 2 | 3 | | | | | 4 | 34 | 2 | 12 | 24 | 2 | | 1 | |
| 22. Peterborough | 679 | 564 | 2 | 562 | 10 | 16 | 488 | 54 | 7 | 6 | 3 | 3 | | 3 | | | 95 | | 19 | 67 | | | 17 | |
| (m) Greenville | 103 | 80 | | 80 | | 12 | 59 | 19 | 3 | 4 | 3 | 4 | | 4 | | | 17 | 14 | 3 | | | | 2 | |
| 23. Hillsborough | 481 | 406 | 1 | 405 | 6 | 7 | 312 | 28 | 5 | 19 | 2 | 10 | 2 | 8 | | 2 | 50 | 11 | 5 | 36 | | 3 | 15 | |
| 24. Goffstown | 1,093 | 984 | 13 | 971 | 15 | 134 | 671 | 94 | 21 | 38 | 9 | 31 | | 31 | | 1 | 43 | 4 | 17 | 23 | | 2 | 35 | |
| 25. Keene | 2,517 | 2,094 | 28 | 2,066 | 191 | 105 | 1,321 | 228 | 45 | 79 | 20 | 47 | 15 | 32 | | 16 | 167 | 85 | 50 | 45 | 3 | 21 | 209 | 18 |
| (m) Hinsdale | 178 | 171 | | 171 | 6 | 4 | 129 | 22 | 4 | 15 | 2 | 7 | 4 | 3 | | | | | | | | | | |
| (m) Walpole | 95 | 95 | | 95 | 1 | 4 | 89 | 1 | | | | | | | | | | | | | | | | |
| 26. Jaffrey | 651 | 555 | 11 | 544 | 19 | 32 | 353 | 68 | 14 | 27 | 10 | 3 | | 3 | 3 | | 93 | 6 | 87 | | | | | |
| 27. Claremont | 1,195 | 1,039 | 22 | 1,017 | 178 | 92 | 402 | 154 | 19 | 65 | 22 | 24 | 1 | 23 | | 2 | 118 | 17 | 89 | 21 | | | 14 | |
| (m) Charlestown | 108 | 107 | 1 | 106 | 2 | 5 | 83 | 9 | 3 | 3 | 2 | | | | | | 1 | | | 1 | | | | |
| 28. Newport | 527 | 493 | 22 | 471 | 29 | 8 | 317 | 67 | 10 | 4 | 2 | 17 | | 17 | | | 4 | | 4 | | | | 13 | |
| (m) Sunapee | 78 | 75 | 1 | 74 | 1 | 1 | 68 | 6 | 3 | | | | | | | | 2 | | | 2 | | | 1 | |
| 29. Hanover | 377 | 334 | 3 | 331 | 19 | 9 | 238 | 23 | 6 | 11 | 4 | 3 | | 3 | | | 40 | | 17 | 25 | | | | |
| 30. Haverhill | 318 | 192 | 1 | 191 | 7 | 13 | 116 | 14 | 4 | 8 | | 8 | | 8 | | 17 | 117 | | 1 | 121 | 12 | 2 | 1 | |
| 31. Lebanon | 1,114 | 843 | 21 | 822 | 107 | 14 | 492 | 81 | 26 | 44 | 9 | 38 | 14 | 24 | | | 228 | 5 | 130 | 93 | | | 5 | |
| (m) Canaan | 64 | 57 | | 57 | 5 | 2 | 39 | 11 | | 3 | 1 | 2 | | 2 | | | 5 | 4 | | 1 | | | | |
| *(m) Enfield | 7 | 7 | | 7 | | | 6 | | | 1 | | | | | | | | | | | | | | |
| 32. Littleton | 693 | 530 | 7 | 523 | 23 | 14 | 309 | 35 | 1 | 11 | 7 | 18 | 1 | 17 | | | 143 | 114 | 24 | 5 | | | 2 | |
| (m) Bethlehem | 68 | 67 | | 67 | 1 | | 57 | 2 | | | | 1 | | 1 | | | | | | | | | | |
| 33. Plymouth | 633 | 562 | 3 | 559 | 16 | 69 | 477 | 47 | 7 | 6 | 4 | 5 | | 5 | | | 63 | 58 | 5 | | | | 3 | |
| (m) Ashland | 165 | 133 | 1 | 132 | 2 | 26 | 105 | 2 | | 4 | 1 | 6 | 5 | 3 | | | 26 | 5 | 4 | 16 | 1 | | | |
| (m) Bristol | 233 | 139 | | 139 | 1 | 49 | 52 | 6 | 1 | | | 11 | | 11 | | | 83 | 4 | 19 | 60 | | | | |
| (m) Campton | 71 | 61 | 4 | 57 | | | 55 | 6 | 1 | 1 | | | | | | | 10 | 6 | 4 | | | | | |
| (m) Lincoln | 192 | 181 | 1 | 180 | 3 | 19 | 159 | 4 | | 4 | 3 | | | | | 2 | 10 | | 12 | | | | 1 | |
| (m) Woodstock | 151 | 144 | | 144 | | 3 | 132 | 12 | 1 | 3 | 4 | 2 | 2 | | | | 5 | 5 | | | | | | |
| 34. Berlin | 753 | 538 | 2 | 536 | 64 | 58 | 274 | 125 | 31 | 10 | 3 | 22 | 1 | 21 | | | 191 | 22 | 12 | 157 | | | 2 | |
| 35. Gorham | 311 | 277 | | 277 | 3 | | 213 | 43 | 7 | | 4 | | | | | | 31 | 2 | 3 | 26 | | | 3 | |
| 36. Colebrook | 550 | 442 | 12 | 430 | 20 | 9 | 228 | 21 | 2 | 5 | 2 | 16 | | 16 | 1 | | 92 | 61 | 31 | | | | | |
| 37. Lancaster | 457 | 340 | 1 | 336 | 15 | 32 | 289 | 64 | 18 | 2 | 6 | 2 | | 2 | | | 113 | 1 | 26 | 86 | | | 2 | |
| (m) Northumberland | 189 | 169 | 1 | 168 | 8 | 9 | 98 | 22 | 9 | 5 | 1 | 8 | 2 | 6 | | | 12 | 7 | 3 | 2 | | | | |
| (m) Whitefield | 223 | 207 | 2 | 205 | 9 | 6 | 101 | 26 | 4 | 6 | 1 | | | | | 6 | 16 | | 14 | 6 | 2 | | | |
| TOTALS | 59,774 | 51,197 | 954 | 50,243 | 3,606 | 10,766 | 29,633 | 4,449 | 818 | 1,837 | 562 | 1,801 | 169 | 1,632 | 16 | 236 | 4,778 | 798 | 1,485 | 2,510 | 224 | 423 | 1,998 | 5 |

*Enfield Municipal Court was abolished by resignation of the Justice, effective February 22, 1966.

# THE STATE OF NEW HAMPSHIRE
## JUDICIAL COUNCIL

### Statistics On Work of District and Municipal Courts—1966

| | CRIMINAL CASES | | | | | | | | | JUVENILE CASES | | | | SMALL CLAIMS | | | | | CIVIL CASES | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | Motor Vehicle | | | | | | | | | | | | | | | | | | | | | | | |
| | Felonies | Misdemeanors | Drunkenness | Parking and Local Ordinances | State Motor Vehicle Laws | Respondent Plead Not Guilty | Respondent Found Not Guilty | Nol Prossed | Appealed | Total Juvenile Cases | Neglected Children | Delinquent Children | Transferred to Superior Court | Pending 12/31/65 | Entered | Judgment Entered After Hearing | Judgment Entered on Default | Otherwise Disposed of | Pending 12/31/66 | Pending 12/31/65 | Entered | Tried or Heard | Settlement | Pending 12/31/66 | Damages to Persons or Property | Contracts | Landlord and Tenant | Transferred to Superior Court |
| | 51 | 1,286 | 66 | 158 | 897 | 72 | 8 | 46 | 11 | 55 | 17 | 38 | | 7 | 177 | 6 | 59 | 107 | 12 | 2 | 61 | 2 | 61 | | 5 | 13 | 45 | 3 |
| | | 92 | | 55 | 34 | 5 | 1 | 1 | | | | | | | 1 | | 1 | | | | | | | | | | |
| | 2 | 216 | 1 | 45 | 115 | 15 | 7 | 8 | 1 | 5 | 1 | 4 | 2 | | 5 | 2 | | 3 | | | | | | | | | |
| | 8 | 1,919 | 134 | 82 | 1,289 | 127 | 19 | 140 | 32 | 44 | 1 | 43 | | | 69 | 4 | 17 | 48 | | | 27 | 7 | 20 | | 6 | 15 | 6 | |
| | 7 | 316 | 10 | 5 | 194 | 56 | 11 | 31 | 6 | 3 | | 3 | | | 44 | 7 | 6 | 31 | | | 1 | 1 | | | | | 1 | |
| | 14 | 482 | 15 | 31 | 353 | 63 | 9 | 7 | 17 | 13 | 1 | 12 | | 6 | 216 | 29 | 38 | 155 | | 6 | 62 | 6 | 62 | 3 | 3 | 65 | 6 | 2 |
| | 1 | 117 | 3 | 22 | 70 | 26 | 9 | 3 | 3 | 8 | 1 | 7 | | | 10 | 3 | | 7 | | | | | | | | | |
| | 1 | 206 | 2 | 37 | 157 | 23 | 7 | | 1 | 3 | | 3 | | | 12 | 1 | 4 | 7 | | | 1 | | 1 | | | | 1 | |
| | 11 | 639 | 6 | 77 | 405 | 98 | 29 | 14 | 6 | 33 | 1 | 32 | | 4 | 155 | 3 | 42 | 98 | 16 | | 31 | 5 | 22 | 4 | 3 | 17 | 11 | |
| | 7 | 379 | 6 | 21 | 290 | 45 | 5 | 13 | 4 | 5 | | 5 | | | 19 | 3 | 5 | 11 | | 3 | 11 | 4 | 9 | 1 | 5 | 6 | 2 | |
| | | 60 | | | 51 | 3 | 2 | | 2 | | | | | | 29 | | | 29 | | | | | | | | | | |
| | 23 | 1,179 | 23 | 29 | 957 | 158 | 10 | 63 | 19 | 25 | | 25 | 1 | 3 | 86 | 24 | 26 | 39 | | 3 | 44 | 16 | 26 | 5 | 7 | 23 | 14 | |
| | 14 | 634 | 7 | 57 | 485 | 54 | 18 | 28 | 1 | 5 | 2 | 3 | | | 174 | 42 | 19 | 113 | | | 30 | 14 | 16 | | 1 | 19 | 10 | |
| | 39 | 1,664 | 122 | 702 | 879 | 150 | 10 | 9 | 68 | 29 | 7 | 22 | | | 76 | 42 | 34 | | | | 35 | 23 | 12 | 18 | 1 | 5 | 12 | |
| | 18 | 1,251 | 36 | 97 | 987 | 113 | 6 | 24 | 17 | 31 | 4 | 27 | | 5 | 101 | 11 | 49 | 39 | 7 | | 24 | 5 | 19 | | 5 | 13 | 6 | |
| | 8 | 190 | 16 | 2 | 118 | 29 | 1 | 4 | 3 | 24 | | 24 | 1 | | 13 | | 6 | 7 | | | | | | | | | | |
| | 15 | 327 | 18 | 25 | 216 | 23 | 1 | 11 | 8 | 22 | 1 | 21 | | 1 | 136 | 10 | 33 | 92 | 2 | | 12 | 1 | 8 | 3 | 1 | 3 | 8 | |
| | 3 | 200 | 6 | 32 | 104 | 44 | 16 | 8 | 9 | 6 | | 6 | 1 | | 2 | | | 2 | | | | | | | | | | |
| | | 453 | 5 | 51 | 315 | 61 | 5 | 10 | 9 | 2 | | 2 | | | 4 | | | 4 | | | | | | | | | | |
| | 18 | 1,847 | 187 | 241 | 953 | 223 | 22 | 61 | 21 | 108 | 4 | 104 | 1 | 29 | 183 | 7 | 30 | 170 | 5 | 22 | 85 | 91 | | 16 | 8 | 78 | 4 | 1 |
| | | 212 | 2 | | 179 | 15 | 4 | 3 | 2 | 1 | | 1 | | 3 | 19 | 12 | 1 | 7 | 2 | | | | | | | | | |
| | 8 | 347 | 3 | | 322 | 14 | 2 | 14 | 1 | 2 | | 2 | | | 2 | 1 | 1 | | | | | | | | | | | |
| | 3 | 344 | 2 | 6 | 285 | 29 | 1 | 1 | 1 | 19 | 6 | 13 | | | 18 | 4 | 14 | | | | | | | | | | | |
| | 1 | 234 | 11 | | 193 | 42 | 8 | 9 | | 7 | | 7 | | | 12 | 4 | 8 | | | | 1 | | 1 | | | | 1 | |
| | 6 | 443 | 13 | 38 | 270 | 34 | 8 | 39 | 6 | 27 | 1 | 26 | | 33 | 136 | 2 | 42 | 107 | 18 | 14 | 22 | | 19 | 17 | | 30 | 1 | |
| | 9 | 305 | 6 | 8 | 253 | 32 | 6 | 12 | 7 | 7 | | 7 | | 23 | 43 | 15 | 29 | 22 | | | 8 | 1 | 3 | 4 | | 6 | 2 | 1 |
| | 20 | 210 | 3 | 3 | 106 | 46 | 10 | 15 | 1 | 16 | 1 | 15 | | 2 | 125 | 1 | 1 | 97 | 28 | 4 | 7 | 1 | 1 | 9 | 1 | 8 | 1 | |
| | 30 | 2,921 | 164 | 908 | 1,879 | 126 | 27 | 113 | 14 | 78 | 7 | 71 | | 30 | 180 | 5 | 32 | 146 | 27 | 239 | 336 | 14 | 207 | 346 | 54 | 275 | 7 | 1 |
| | | 41 | | | 27 | 8 | | 3 | | | | | | | | | | | | | | | | | | | | |
| | 7 | 551 | 18 | 1 | 539 | 40 | 8 | 14 | 5 | 2 | | 2 | | | 13 | 2 | 2 | 9 | | | 1 | | 1 | | | | 1 | |
| | | 68 | 5 | 1 | 52 | 14 | | 1 | | 4 | | 4 | | | 4 | | 1 | 2 | 1 | | | | | | | | | |
| | 2 | 74 | 22 | 1 | 53 | 8 | 2 | | 1 | 10 | 4 | 6 | | | 9 | 2 | 5 | 2 | | | 2 | 1 | 1 | | | | 2 | |
| | 2 | 268 | 4 | 39 | 170 | 30 | 5 | 14 | 3 | 5 | | 5 | | | 5 | | 2 | 3 | 1 | | 2 | 1 | 1 | | | | 2 | |
| | 12 | 1,241 | 47 | 91 | 976 | 78 | 23 | 16 | 22 | 30 | 8 | 22 | | 4 | 135 | 11 | 109 | 15 | | | 33 | 9 | 24 | | 7 | 21 | 5 | |
| | 1 | 93 | | 16 | 56 | 4 | 1 | 1 | | | | | | | | 4 | | | | | | | | | | | | |
| | 2 | 243 | 3 | 31 | 122 | 21 | 6 | 10 | 2 | 20 | 1 | 19 | | | | 1 | 11 | 7 | 1 | 1 | 2 | 2 | | 1 | 1 | 1 | 1 | |
| | 330 | 11,007 | 1,529 | 5,662 | 3,649 | 839 | 170 | 444 | 103 | 635 | 28 | 607 | 1 | 34 | 320 | 50 | 120 | 123 | 61 | 86 | 442 | 54 | 393 | 81 | 33 | 320 | 85 | 7 |
| | 3 | 340 | 2 | 54 | 276 | 42 | 19 | 2 | 8 | 2 | | 2 | | | 12 | 7 | 1 | 4 | | | | | | | | | | |
| | 90 | 4,664 | 338 | 1,288 | 2,441 | 216 | 48 | 205 | 11 | 197 | 25 | 172 | | 4 | 259 | 6 | 122 | 120 | 15 | 12 | 345 | 82 | 252 | 23 | 40 | 252 | 51 | |
| | 3 | 418 | | 14 | 370 | 22 | 9 | 7 | 1 | 12 | | 12 | 1 | 1 | 57 | 16 | 13 | 24 | 5 | | 5 | 4 | 1 | | | | 5 | |
| | 1 | 127 | 1 | 16 | 81 | 6 | 2 | 6 | 1 | 1 | | 1 | | 1 | 15 | 9 | | 7 | | | | | | | | | | |
| | 15 | 712 | 9 | 59 | 556 | 92 | 8 | 41 | 7 | 17 | 3 | 14 | | | 69 | 10 | 14 | 42 | 3 | 3 | 42 | 6 | 33 | 6 | 3 | 35 | 7 | |
| | 6 | 200 | | 9 | 177 | 11 | 3 | 2 | 3 | | | | | 4 | 34 | 2 | 12 | 24 | 2 | | 1 | 1 | | | | | 1 | |
| | 2 | 562 | 10 | 16 | 488 | 54 | 7 | 6 | 3 | 3 | | 3 | | | 95 | | 19 | 67 | | | 17 | 6 | 10 | 1 | 1 | 13 | 3 | |
| | | 80 | | 12 | 59 | 19 | 3 | 4 | 3 | 4 | | 4 | | | 17 | 14 | 3 | | | | 2 | | 2 | | | | 2 | |
| | 1 | 405 | 6 | 7 | 312 | 28 | 5 | 19 | 2 | 10 | 2 | 8 | | 2 | 50 | 11 | 5 | 36 | | 3 | 15 | 2 | 14 | 6 | 1 | 15 | 2 | |
| | 13 | 971 | 15 | 134 | 671 | 94 | 21 | 38 | 9 | 31 | | 31 | | 1 | 43 | 4 | 17 | 23 | | 2 | 35 | 1 | 32 | 4 | 32 | | 5 | |
| | 28 | 2,066 | 191 | 105 | 1,321 | 228 | 45 | 75 | 20 | 47 | 15 | 32 | | 16 | 167 | 85 | 50 | 45 | 3 | 21 | 209 | 180 | 50 | 17 | 15 | 184 | 31 | |
| | | 171 | 6 | 4 | 129 | 22 | 4 | 15 | 2 | 7 | 4 | 3 | | | | | | | | | | | | | | | | |
| | | 95 | 1 | 4 | 89 | 1 | | | | | | | | | | | | | | | | | | | | | | |
| | 11 | 544 | 19 | 32 | 353 | 68 | 14 | 27 | 10 | 3 | | 3 | 3 | | 93 | 6 | 87 | | | | | | | | | | | |
| | 22 | 1,017 | 178 | 92 | 402 | 154 | 19 | 65 | 22 | 24 | 1 | 23 | | 2 | 118 | 17 | 82 | 21 | | | 14 | 5 | 8 | 1 | 1 | 4 | 9 | |
| | 1 | 106 | 2 | 5 | 83 | 9 | 3 | 3 | 2 | | | | | | 1 | | | 1 | | | | | | | | | | |
| | 22 | 471 | 29 | 8 | 317 | 67 | 10 | 4 | 2 | 17 | | 17 | | | 4 | | 4 | | | | 13 | 3 | 10 | | | 3 | 10 | |
| | 1 | 74 | 1 | 1 | 68 | 6 | 3 | | | | | | | | 2 | | | 2 | | | 1 | 1 | | | | | 1 | |
| | 3 | 331 | 19 | 9 | 238 | 23 | 6 | 11 | 4 | 3 | | 3 | | | 40 | | 17 | 23 | | | | | | | | | | |
| | 1 | 191 | 7 | 13 | 116 | 14 | 4 | 8 | | 8 | | 8 | | 17 | 117 | | 1 | 121 | 12 | 2 | 1 | 3 | | | 1 | 2 | | |
| | 21 | 822 | 107 | 14 | 492 | 81 | 26 | 44 | 9 | 38 | 14 | 24 | | | 228 | 5 | 130 | 93 | | | 5 | 4 | 1 | | | 1 | 4 | |
| | | 57 | 5 | 2 | 39 | 11 | | 3 | 1 | 2 | | 2 | | | 5 | 4 | | 1 | | | | | | | | | | |
| | | 7 | | | 6 | | | 1 | | | | | | | | | | | | | | | | | | | | |
| | 7 | 523 | 23 | 14 | 309 | 35 | 1 | 11 | 7 | 18 | 1 | 17 | | | 143 | 114 | 24 | 5 | | | 2 | 2 | 2 | | | | 2 | |
| | | 67 | 1 | | 57 | 2 | | | | 1 | | 1 | | | | | | | | | | | | | | | | |
| | 3 | 559 | 16 | 69 | 477 | 47 | 7 | 6 | 4 | 5 | | 5 | | | 63 | 58 | 5 | | | | 3 | 3 | 3 | | 3 | | | |
| | 1 | 132 | 2 | 26 | 105 | 2 | | 4 | 1 | 6 | 5 | 3 | | | 26 | 5 | 4 | 16 | 1 | | | | | | | | | |
| | | 139 | 1 | 49 | 52 | 6 | 1 | | | 11 | | 11 | | | 83 | 4 | 19 | 60 | | | | | | | | | | |
| | 4 | 57 | | | 55 | 6 | 1 | 1 | | | | | | | 10 | 6 | 4 | | | | | | | | | | | |
| | 1 | 180 | 3 | 19 | 159 | 4 | | 4 | 3 | | | | | 2 | 10 | | 12 | | | | 1 | 1 | | | | 1 | | |
| | | 144 | | 3 | 132 | 12 | 1 | 3 | 4 | 2 | 2 | | | | 5 | 5 | | | | | | | | | | | | |
| | 2 | 536 | 64 | 58 | 274 | 125 | 31 | 10 | 3 | 22 | 1 | 21 | | | 101 | 22 | 12 | 157 | | | 2 | 1 | 1 | | | 1 | 1 | 1 |
| | | 277 | 3 | | 213 | 43 | 7 | | 4 | | | | | | 31 | 2 | 3 | 26 | | | 3 | 3 | | | | | 3 | |
| | 12 | 430 | 20 | 9 | 228 | 21 | 2 | 5 | 2 | 16 | | 16 | 1 | | 92 | 61 | 31 | | | | | | | | | | | |
| | 4 | 336 | 15 | 32 | 289 | 64 | 18 | 2 | 6 | 2 | | 2 | | | 113 | 1 | 26 | 86 | | | 2 | 2 | | | 1 | | 1 | |
| | 1 | 168 | 8 | 9 | 98 | 22 | 9 | 5 | 1 | 8 | 2 | 6 | | | 12 | 7 | 3 | 2 | | | | | | | | | | |
| | 2 | 205 | 9 | 6 | 101 | 26 | 4 | 6 | 1 | | | | | 6 | 16 | | 14 | 6 | 2 | | | | | | | | | |
| | 954 | 50,243 | 3,606 | 10,766 | 29,633 | 4,449 | 818 | 1,837 | 502 | 1,801 | 169 | 1,632 | 16 | 236 | 4,778 | 798 | 1,485 | 2,510 | 224 | 423 | 1,998 | 568 | 1,324 | 566 | 239 | 1,428 | 383 | 16 |

by resignation of the Justice, effective February 22, 1966.

of cases for the preceding ten years. The following comparison is based on the cases for 1966 compared to the previous 10-year average:

**Comparison 10-year average Cases with 1966 cases**

| | Average No. of Cases 1956-1965 | Total Cases 1966 | Percentage of Increase - Decrease |
|---|---|---|---|
| Total All Cases | 42,126 | 59,774 | 42% |
| Criminal Cases | 34,480 | 51,197 | 48% |
| Juvenile Cases | 1,476 | 1,801 | 22% |
| Small Claims | 5,223 | 4,778 | −8½% |
| Civil Cases | 947 | 1,998 | 111% |

**Comparison Showing Increase—1966 over 1965**

| | 1965 | 1966 | Percentage of Increase - Decrease |
|---|---|---|---|
| Total All Cases | 53,152 | 59,774 | 12% |
| Criminal Cases | 45,007 | 51,197 | 14% |
| Juvenile Cases | 1,933 | 1,801 | −7% |
| Small Claims | 4,587 | 4,778 | 4% |
| Civil Cases | 1,625 | 1,998 | 23% |

A comparison of the Total Number of Motor Vehicle Cases to the Total Criminal Cases for the past three years:

| | Total Criminal Cases | (State) M. V. Violations | (Town) M. V. Violations | Total M. V. Violations | M. V. Violations To Total Criminal Percentage |
|---|---|---|---|---|---|
| 1964 | 41,066 | 24,219 | 7,010 | 31,229 | 76% |
| 1965 | 45,007 | 27,050 | 7,326 | 34,376 | 76% |
| 1966 | 51,197 | 29,633 | 10,766 | 40,399 | 79% |

RAE S. LARABA
Secretary

State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
Trenton, New Jersey 08625

November 17, 1967

Honorable Jack P. F. Gremillion
Attorney General of Louisiana
Department of Justice
New Orleans, Louisiana

Re:

Gary Duncan v. State of Louisiana
*Appeal to United States Supreme Court No. 410*

Dear General:

I am in receipt of your letter of November 10, 1967, and have attempted herein to provide you with the information you have requested. The history of New Jersey proceedings with reference to minor offenses may be found in the case of *State v. Maier*, 99 Atl. 2d 13, 21 N.J. 235 (1953).

The following are the answers to your questions:

(a) Does your State require trial by jury in all misdemeanor cases? In all offenses in which the penalty might exceed six months' imprisonment?

ANSWER: In New Jersey, the term "misdemeanor" envelops the common law felony and all other serious offenses carrying with them a penalty of more than one year in jail. *Jackson v. State*, 49 N.J.L. 252 (Sup. Ct. 1887). These offenses require an indictment and trial by jury. The common-law "misdemeanor" to which your questions refer is known as a disorderly persons offense in New Jersey. N.J.S.

2A:170-1, et seq. These disorderly persons offenses carry with them a maximum penalty of one year in jail or $1,000 fine or both. N.J.S. 2A:169-4. Disorderly persons violations are considered to be minor offenses in New Jersey and are therefore tried summarily without indictment and trial by jury. It is the minor nature of these offenses rather than the penalty involved which determines whether a trial by jury will accrue. *Latimer v. Wilson,* 103 N.J.L. 159 (E. & A. 1926).

*ANSWER:* In no instance is a trial by jury required in New Jersey for a minor offense.

(c) Are there any provisions for trial without a jury in the local courts of your state, such as municipal courts, mayor's courts, traffic courts, justice of the peace courts, and the like, and if so, is trial without jury provided in local courts where the penalty might exceed six months' imprisonment?

*ANSWER:* The Magistrate's court may summarily proceed with the following offenses:

(a) Violations of motor vehicle and traffic laws;

(b) Violations of Fish and Game laws;

(c) Violations of municipal ordinances;

(d) Violations of the disorderly persons law;

(e) Violations of Title 44—"Poor" of the Revised Statutes (Ch. 1 and Ch. 4);

(f) Violations of Title 9—"Children" of the Revised Statutes (Ch. 6 and 17);

(g) Violations of Title 30—"Institutions and Agencies" of the Revised Statutes (Ch. 5, Art. 4).

(h) Offenses of a lesser degree than misdemeanor for which no indictment is required.

N.J.S. 2A:8-21.

(d) What is your State's definition of a misdemeanor?

*ANSWER:* For a definition of "misdemeanor", see the history in the case of *State v. Maier, supra.* See also the answer to question (a) in reference to disorderly persons offenses, which, in fact, are the subject of your inquiry.

(e) If there are instances in which trial by jury is required for misdemeanor or for offenses in which the penalty might exceed six months' imprisonment, what is your State's requirement as to the number of jurors and as to number of jurors' votes requires for conviction?

*ANSWER:* Not applicable.

I believe that this information should assist you in the above captioned matter.

Very truly yours,

/s/ JOSEPH A. HOFFMAN
Assistant Attorney General

JAH:emo

COMMONWEALTH OF PUERTO RICO
Office of the Attorney General
San Juan

Hon. Jack P. F. Gremillion
Attorney General
State of Louisiana
Department of Justice
Baton Rouge

Dear General Gremillion:

I have your letter of 10 November 1967 regarding *Gary Duncan v. State of Louisiana*, appeal to the United States Supreme Court, No. 410, as to jury trial in a misdemeanor case.

Your questions (a), (b) and (c) can be first answered by quoting the law.

(A) Rule 111 of Criminal Procedure of Puerto Rico, 1963 states:

"Rule 111. RIGHT TO TRIAL BY JURY AND ITS WAIVER.-

Questions of fact in cases of felony and, *except as provided by special statutes, in misdemeanor cases, provided that the information was originally filed in the Superior Court and was also within the jurisdiction of the District Court,* shall be tried by jury unless the defendant expressly and personally waives the right to trial by jury. The court shall grant the trial by jury at any time after the arraignment." (Underlining ours).

(B) Article II, Section II of the Constitution of the Commonwealth of Puerto Rico provides that:

". . . In all prosecution for a *felony* the accused

shall have the right of trial by an impartial jury composed of twelve residents of the district, who may render their verdict by a majority vote which in no case may be less than nine." (Underlining provided).

(C) In the case of *The People of Puerto Rico v. Leandro Miranda*, 79 D.P.R. 667 (1956), the Supreme Court of Puerto Rico held that:

"(1) In support of the first assignment, appellant maintains that, in view of the nature of the offense and of the penalties provided by law, the constitutional provision which guarantees to every accused a trial by jury 'in all prosecutions for a felony,' is applicable. We do not agree. Paragraph 2 of Sec. 11 of Art. II of the Constitution of the Commonwealth of Puerto Rico provides that: 'In all prosecutions for a felony the accused shall have the right of trial by an impartial jury composed of twelve residents of the district, who may render their verdict by a majority vote which in no case may be less than nine. L.P.R.A., Vol. I, p. 181. As clearly indicated by the report of the Bill of Rights Committee and the debates of the Constitutional Convention, the term 'felony' employed in that constitutional provision does not include any offense classified as a misdemeanor under the legislation enacted before the Constitution went into effect, which did not necessarily grant the right to trial by jury. The nature of the offense and the penalties provided by law are of slight importance in this respect.[2] Here the violations for which appellant

[2]In explaining the limited scope of the constitutional guaranty of a trial by jury in felony cases, the Committee

was prosecuted were characterized as misdemeanors under Act No. 31 of September 15, 1950. And the law specifically provides that the trial shall be held by the court."

(D) Lately, attacks have been made as to this point in our Courts, but still in *The People of Puerto Rico v. Hector Juan Diaz-Torres*, No. CR-62-405, 30 December 1963, the Supreme Court of Puerto Rico (not reported in English), our highest court, con-

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pointed out the following: "We have not used the term 'grave' as equivalent to 'felony', as defined in our penal law. We have used it as including all 'felony' offenses and those others in which, without being so, present legislation grants a fortiori the right to trial by jury. An example of this is the offense of involuntary manslaughter which, although a 'misdemeanor', can only be tried in the District Court, the defendants charged with this offense having the right to a trial by jury. However, those misdemeanors with respect to which the existing legislation grants the right to trial by jury whenever they are originally prosecuted in the District Court but not when they are originally prosecuted in the Municipal Court, are not included, nor such misdemeanors as to which the existing legislation does not grant the right to a trial by jury, although they are prosecuted originally in the District Court.

The word 'grave' as used in the text, shall always include the offenses now classified as 'felonies', even though this classifications may disappear in the future. It shall also include always those misdemeanors in which the right to trial by jury is now necessarily granted." (Italics ours). See 21 Revista Juridica de la Universidad de Pureto Rico 1, 19 (1951).

On the other hand, the same view on the meaning of the term 'felony' and the scope of the constitutional right to a trial by jury was adopted in the debates of the Constitutional Convention. Journal of Sessions, Constitutional Convention of Puerto Rico, p. 606.

firmed their findings and decision in the *Miranda* case, supra.

As to question (d), we quote Article 14 (Section 35 of the Laws of Puerto Rico Annotated, Title 33) of the Penal Code, 1937:

"FELONY AND MISDEMEANOR DEFINED

A felony is a crime which is punishable with death, or by imprisonment in the penitentiary. Every other crime is a misdemeanor. When a crime punishable by imprisonment in the penitentiary is also punishable by fine or imprisonment in jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the penitentiary."

Regarding question (e), I think it has been already answered above. Nevertheless, I wish to make clear that for conviction, it is required of at least nine (9) jurors and there exists the right to poll the jury by either party or on the court's own motion.

I hope the above information will be of help to you.

Cordially,

/s/ JOSÉ C. APONTE
Attorney General

GOVERNMENT OF
THE VIRGIN ISLANDS OF THE
UNITED STATES

Department of Law
P.O. Box 280
Charlotte Amalie, St. Thomas, V.I. 00801

November 20, 1967

Honorable Jack P. F. Gremillion
Attorney General
Department of Justice
104 Supreme Court Building
301 Loyola Avenue
New Orleans, Louisiana 70804

Re:

Gary Duncan vs. State of
Louisiana - Appeal to the
United States Supreme Court
No. 410

Dear General:

Reference is made to your letter dated November 10th relating to the above-captioned matter.

To assist in providing the Supreme Court with a detailed picture as to the law of the states with respect to providing a jury trial in misdemeanor situations, I present the following information in reply to the five questions which you pose:

(a) and (b). The Revised Organic Act of 1954 (Act of Congress, July 22, 1954, Ch. 558, 68 Stat. 497) does not require trial by jury in all misdemeanor cases. In misdemeanor cases where the penalty does

not exceed six months' imprisonment there is no provision for a jury trial; where, however, the penalty does exceed six months' imprisonment and the trial is conducted in the District Court (a statutory—rather than a constitutional—Federal District Court) the defendant is entitled to a jury trial, in accordance with the provisions of Section 26 of the Revised Organic Act:

"Sec. 26. Trial by jury

All criminal cases originating in the district court [i.e. felonies or misdemeanors where the maximum penalty exceeds six months] shall be tried by jury upon demand by the defendant or by the Government. If no jury is demanded the case shall be tried by the judge of the district court without a jury, except that the judge may, on his own motion, order a jury for the trial of any criminal action. The legislature may provide for trial in misdemeanor cases by a jury of six qualified persons."

It should be noted that both the District and Municipal Courts of the Virgin Islands (the latter being established by the Legislature of the Virgin Islands) have concurrent jurisdiction over misdemeanors when the penalty exceeds six months, if the case is tried in the Municipal Court the trial is without a jury, if in the District Court, a jury trial may be held in accordance with Section 26.

(c) There are in the Virgin Islands only two courts, the District Court and the Municipal Court, hence, the answer to question (c) is to be found in questions (a) and (b).

(d) The definition of a misdemeanor is found in Section 2 of Title 14 of the Virgin Islands Code as follows:

"(a) Crimes or offenses are divided into felonies and misdeameanors.

"(b) Notwithstanding any act of the Legislature to the contrary

(1) a felony is a crime or offense which is punishable by imprisonment for more than one year; and

(2) every other crime or offense is a misdemeanor."

(e) The jury which would sit at a misdemeanor trial is composed of 12 members and a unanimous vote is necessary for conviction. The authority of the Legislature (see last sentence of Section 26 of the Revised Organic Act of 1954) to provide for trial by a jury of six persons has never been exercised.

I trust that the foregoing will be of assistance to you. If additional information is necessary please feel free to contact me.

Cordially,

/s/ PETER J. O'DEA
First Assistant Attorney General

PJO'D:vmm

## APPENDIX "C"

### History of Right to Jury Trial in Criminal Cases in Louisiana

I. French Origin.

At least from the year 1712, the law of France applied to the then French colony of Louisiana. Exclusive jurisdiction in criminal cases was vested in the Superior Council. This council was a judicial court, composed of a varying number of men, three of whom had to be the three principal colonial officials and two or more of whom were prominent local citizens or persons specially commissioned in France for the task. Five members of the Council had to concur for a judgment in a criminal case. See Dart, "The Place of the Civil Law in Louisiana," 4 Tul. L. Rev. 163, 164 (1930).

II. Spanish History.

Shortly after the cession of Louisiana to Spain, in 1769, the French criminal law was swept away and the Spanish law substituted. See, 4 Dart, *op. cit. supra*, at 165; and Lobingier, introduction to *Las Siete Partidas*, translated by Scott (CCH ed., 1931) at liii. Exclusive criminal jurisdiction was vested in several individual judges, called *alcaldes*, except where a defendant had the right to be tried by a military or ecclesiastical court. See Martin, *The History of Louisiana from the Earliest Period* (1882) at 209-212; III Gayarre, *History of Louisiana* (2d ed., 1879) at 3-4, 7; and Lobigier, *op. cit. supra*, at lxxii.

Although Spain ceded Louisiana back to France shortly before the United States took possession, the Spanish law remained in effect. Tucker, "Source Books of Louisiana Law, Part III, Spanish Laws," 9 Tul. L. Rev. 396-7 (1933-34).

III. American History.

From the outset, the United States took cognizance of the French and Spanish origins of its Louisiana citizenry. In passing the original laws for the territory of Orleans (the present day Louisiana), Congress provided that:

> "In all criminal prosecutions which are *capital*, the trial shall be by a jury of twelve good and lawful men of the vicinage; and in all cases criminal and civil in the superior court, the trial shall be by a jury, if either of the parties require it." Sec. 5, Act of March 26, 1804, 2 U.S. Stat. 283, at 284.

However, for the rest of the area covered by the Louisiana purchase (the *territory* of Louisiana), Congress provided that ". . . in *all* criminal prosecutions, the trial shall be by a jury of twelve good and lawful men of the vicinage. . . ." Sec. 12, Act of March 26, 1804, 2 U.S. Stat. 283, at 287.

The First Session of the Legislative Council for the Parish of Orleans enacted Sec. 34 of Chapter L, Acts, on May 4, 1805 which guaranteed trial by jury of every person charged with crimes or misdemeanors, ". . . if the party accused or the person who prosecutes desires it."

The Louisiana Constitution of 1812, provided as follows at Art. VI, (3 West's LSA Constitution (1955), at 520-521):

"Section 18.

"In all criminal prosecutions, the accused have the right of being heard by himself or counsel, of demanding the nature and cause of the accusation against him, of meeting the witnesses face to face, of having compulsory process for obtaining witnesses in his favour, and prosecutions by indictment or information, *a speedy public trial by an impartial jury of the vicinage*, nor shall he be compelled to give evidence against himself." (Emphasis added-)

"Section 23.

"The citizens of the town of New Orleans shall have the right of appointing the several public officers necessary *for the administration and the police of the said city;* pursuant to the mode of election which shall be prescribed by the Legislature: Provided that the mayor and recorder be ineligible to a seat in the general assembly." (Emphasis added.)

The Louisiana Constitution of 1845, Title VI, (3 West's LSA Constitution (1955) at 536, 538) provided as follows:

"Article 107. Prosecutions shall be by indictment or information. The accused shall have a speedy public trial by an impartial jury of the vicinage; . . ."

"Article 128. The citizens of the city of New Orleans shall have the right of appointing the

several public officers necessary for the administration of the police of the said city, pursuant to the mode of elections which shall be prescribed by the legislature: Provided, That the mayor and recorders shall be ineligible to a seat in the general assembly; *and the mayor, recorders, and aldermen shall be commissioned by the governor as justices of the peace, and the legislature may vest in them such criminal jurisdiction as may be necessary for the punishment of minor crimes and offenses, and as the police and good order of the said city may require.*" (Emphasis added)

Additionally, Title IV, Article 81 of that constitution provided that the criminal jurisdiction of the justices of the peace is as shall be provided for by law.

The pertinent provisions of the Louisiana Constitutions of 1852 and 1864 are substantially similar to those of the Constitution of 1845, cited above. For the 1852 provisions, see 3 West's LSA Constitution (1955), Title VI, Article 103, at page 556; Article 124 at p. 558; and Title IV, Article 78, at p. 554. For the 1864 provisions, see *ibid*, Title VII, Article 105, at p. 92; Article 133 at p. 581; and Title V, Article 82, at p. 576.

The pertinent provisions of the Louisiana Constitution of 1868, (3 West's LSA Constitution (1955)), are as follows:

Title I, Article 6, at p. 588.

"Prosecutions shall be by indictment of information. The accused shall be entitled to a speedy public trial by an impartial jury of the

parish in which the offence was committed, unless the venue be changed . . ."

Title IV, Article 87, at p. 599.

"In criminal matters the parish courts shall have jurisdiction in all cases when the penalty is not necessarily imprisonment at hard labor or death, and when the accused shall waive trial by jury. They shall also have the power of committing magistrates and such other jurisdiction as may be conferred on them by law. *There shall be no trial by jury before the parish courts.*" (Emphasis added)

It should also be noted that Title IV, Article 89, at p. 600, provided that justices of the peace shall have criminal jurisdiction as provided by law. Additionally, Title IV, Article 94, at pp. 600-601, provided:

"No judicial powers, except as committing magistrates in criminal cases, shall be conferred on any officers other than those mentioned in this title, except such as may be necessary in towns and cities; and the judicial powers of such offices shall not extend further than the cognizances of cases arising under the police regulations of towns and cities in the State. . . ."

The Louisiana Constitution of 1879, (3 West's LSA Constitution 1955 at p. 612) provided in Article 7 of its Bill of Rights as follows:

"Art. 7. In all criminal prosecutions the accused shall enjoy the right to a speedy public trial by an impartial jury, except that, in cases where the penalty is not necessarily imprisonment at hard labor or death, the General Assembly

may provide for the trial thereof by a jury, less than twelve in number; . . ."

Article 136 of that same Constitution (Ibid., p. 637) provided as follows:

"Art. 136. The General Assembly may provide for police or magistrates' courts, but such courts shall not be vested with jurisdiction beyond the enforcement of municipal ordinances or as committing magistrates."

Pursuant to the Constitution of 1879, the Louisiana State Legislature enacted Section 4 of Act No. 35, dated March 17, 1880. That act provided as follows for offenses not necessarily punishable at hard labor or death:

"Sec. 4. That in all trials held under the provisions of this act, said trial shall be before a jury composed of five persons: *provided*, that the accused may waive trial by jury and be tried by the court; and . . . " (Emphasis added)

The Louisiana Constitution of 1898 (3 West's LSA Constitution (1955), at pp. 667 and 694) provided as follows:

Bill of Rights, Article 9.

"Art. 9. In all criminal prosecutions the accused shall have the right to a speedy public trial by an impartial jury; provided, that cases in which the penalty is not necessarily imprisonment at hard labor, or death, shall be tried by the court *without a jury* or by a jury less than twelve in number, as provided elsewhere in this Constitution; . . ." (Emphasis added.)

> "Art. 116. All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, which shall not be prior to 1904, be tried by the judge *without a jury*. . . ." (Emphasis added.)

Article 140 of the Constitution of 1898 (Ibid., p. 703) also provided for the establishment of two city criminal courts in the City of New Orleans to sit and hear criminal cases without juries.

The Louisiana Constitution of 1913 contained provisions substantially similar to those of the Constitution of 1898. See, 3 West's LSA Constitution (1955), Article 9, at p. 764; Article 116 at p. 788, and Article 140, at p. 801-802.

The current Constitution enforced in Louisiana is the Constitution of 1921, 3 West's LSA Constitution. (1955) Its pertinent provisions are Article 1, Section 9 of the Bill of Rights, which reads in pertinent part:

> "In all criminal prosecutions the accused shall have the right to a speedy, public and impartial trial in accordance with the provisions of this Constitution."

Article 7, Section 41 of the Louisiana Constitution currently provides in pertinent part that:

> ". . . all cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury."

Pursuant to these constitutional provisions of 1921, the Louisiana State Legislature enacted Articles

340 and 341, Act No. 2, dated July 2, 1928, which read as follows:

Article 340.

"Every misdemeanor shall be triable by the judge without the intervention of a jury."

Article 341.

"A misdemeanor is defined to be an offense, the punishment of which is necessarily a fine or imprisonment in the parish jail or both."

These last quoted provisions are the source laws of the current Louisiana statutes in force. Article 779 of the current Code of Criminal Procedure of Louisiana, states:

"A defendant charged with a misdemeanor shall be tried by the court without a jury."

The current definition of "misdemeanor" is contained in Louisiana R.S. 14:2 (1950), which states that:

"In this Code the terms enumerated shall have the following designated meaning:

...

'Felony' is any crime for which an offender may be sentenced to death or imprisonment at hard labor.

...

'Misdemeanor' is any crime other than a felony."

# APPENDIX "D"

## TRIALS BY JURY IN LOUISIANA JUDICIAL DISTRICT COURTS

### Court Years 1965 and 1966

(Compiled by Judicial Council of Supreme Court of Louisiana)

1965
Trial by Jury

| Dist. | Civil | Criminal | 1965 Total |
|---|---|---|---|
| 1. | — | 6 | 6 |
| 2. | 1 | 3 | 4 |
| 3. | — | — | — |
| 4. | — | 32 | 32 |
| 5. | — | 2 | 2 |
| 6. | — | — | — |
| 7. | — | — | — |
| 8. | — | — | — |
| 9. | — | 5 | 5 |
| 10. | 1 | — | 1 |
| 11. | — | 1 | 1 |
| 12. | — | 5 | 5 |
| 13. | — | 1 | 1 |
| 14. | 28 | 13 | 41 |
| 15. | 9 | 5 | 14 |
| 16. | 1 | 12 | 13 |
| 17. | — | 6 | 6 |
| 18. | — | 2 | 2 |
| 19. | 3 | 27 | 30 |
| 20. | — | — | — |
| 21. | — | 4 | 4 |
| 22. | 1 | 10 | 11 |
| 23. | 2 | 6 | 8 |
| 24. | 1 | 19 | 20 |
| 25. | — | 7 | 7 |
| 26. | — | 1 | 1 |
| 27. | — | 2 | 2 |
| 28. | — | 3 | 3 |
| 29. | 1 | — | 1 |
| 30. | 3 | 2 | 5 |
| 31. | — | 6 | 6 |
| Orleans | 82 | 176 | 258 |
| Totals | 133 | 356 | 489 |

1966*
Trial by Jury

| Dist. | Civil | Criminal | 1966 Total |
|---|---|---|---|
| 1. | 2 | 16 | 18 |
| 2. | 1 | 1 | 2 |
| 3. | — | — | — |
| 4. | 1 | 30 | 31 |
| 5. | 1 | 6 | 7 |
| 6. | — | 1 | 1 |
| 7. | — | 1 | 1 |
| 8. | — | 3 | 3 |
| 9. | 3 | 14 | 17 |
| 10. | 1 | 1 | 2 |
| 11. | — | 4 | 4 |
| 12. | 1 | — | 1 |
| 13. | — | 4 | 4 |
| 14. | 40 | 10 | 50 |
| 15. | 5 | 3 | 8 |
| 16. | 3 | 6 | 9 |
| 17. | 5 | 7 | 12 |
| 18. | — | 2 | 2 |
| 19. | 2 | 51 | 53 |
| 20. | — | — | — |
| 21. | 4 | 3 | 7 |
| 22. | 2 | 11 | 13 |
| 23. | 4 | 2 | 6 |
| 24. | 1 | 9 | 10 |
| 25. | — | 2 | 2 |
| 26. | — | 2 | 2 |
| 27. | 2 | — | 2 |
| 28. | 1 | — | 1 |
| 29. | 2 | — | 2 |
| 30. | 5 | — | 5 |
| 31. | — | 5 | 5 |
| Orleans | 74 | 185* | 259 |
| Totals | 160 | 379 | 539 |

*In 1966—48.81% of criminal jury cases took place in Orleans Parish.
**Figures for 1966 cover period from October 1, 1965 through Sept. 30, 1966.

## Report of Cases Processed in Louisiana Judicial District Courts*

| | Civil Cases | | Criminal Cases | | Total Cases | |
|---|---|---|---|---|---|---|
| | Filed | Term. | Filed | Term. | Filed | Term. |
| Statewide Totals | | | | | | |
| (b) | 90,156 | 66,305 | 107,008 | 107,674 | 197,164 | 173,979 |
| Percentage Increase over 1965 Statistics | 9.1 | 7.2 | 27.4 | 18.8 | 18.3 | 14.1 |

(a) Figures include St. Bernard Juvenile Court which was consolidated with the Twenty-Fifth Judicial District Court effective January 1, 1966.

(b) Source: Statistics presented herein are compiled from the monthly reports submitted to the office of the Judicial Administrator by the Clerks of the District Courts throughout the state.

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*Table VII, Annual Report of The Judicial Council of The Supreme Court of Louisiana for 1966.

OFFICE OF DISTRICT ATTORNEY
First Judicial District
Caddo Parish
Suite 201 Court House
Shreveport, Louisiana

December 1, 1967

Mr. William P. Schuler
Second Assistant Attorney General
Supreme Court Building
301 Loyola Avenue
New Orleans, Louisiana

Re:
Gary Duncan vs State of Louisiana
U. S. Supreme Court
Miscl. Number 410

Dear Mr. Schuler:

Your letters of November 10th and 14th in regard to the above case were received by this office but did not reach my desk until this week.

I have assembled some figures which I am enclosing and which I hope will be of some assistance to you.

Yours very truly,

/s/ ALBERT S. LUTZ, JR.
Assistant District Attorney

ASL,JR:leb
encl.

## FIRST JUDICIAL DISTRICT COURT
## CADDO PARISH, LOUISIANA

(Does not Include cases in Shreveport City Court)

1966

| | |
|---|---|
| Jury cases tried | 5 |
| Five Man jury cases tried | 0 |
| Misdemeanor cases tried | 162 |
| Possible sentence exceeded 6 months | 88 |
| Actual sentence exceeded 6 months | 4 |

1967 (January to November 1)

| | |
|---|---|
| Jury cases tried | 11* |
| Five man jury cases tried | 1 |
| Misdemeanor cases tried to Nov. 1 | 152 |
| Possible sentence exceeded 6 Mo. | 88 |
| Actual sentence exceeded 6 Mo. | 3 |

* (4 more set for December)

Average delay between arraignment and trial:

Non-jury cases .....1 to 2 *weeks*
Jury cases .....3 to 9 *Months*

If a twelve man jury was required in all cases where the punishment exceeds 6 months, there would be a hardship in obtaining jurors and a great expense would be added. Some estimated expenses are as follows:

| | |
|---|---|
| Additional Judge | 20,000.00 |
| Additional Assistant District Atty. | 10,000.00 |
| Court Reporter | 6,000.00 |
| Additional Court Room | ? |
| Might have to put addition to Court House Jurors ($850 to $1000 per case) | |
| Additional Clerk | 7,000.00 |
| Additional Bailiff | 7,000.00 |

NOTE: In addition to District Court cases, the *State* misdemeanor *charges* in City Court *yearly* would be *at least* these figures:

1. Traffic (*only* D.W.I., Leaving Scene & Reckless Driving .....2,000
2. All other *State* misdemeanors (*excluding all* Disturbing Peace cases, Vagrancy & Liquor Violations .....2,000

## EXPENSES PAID BY THE CADDO PARISH POLICE JURY FOR JURY TRIALS IN THE FIRST JUDICIAL DISTRICT COURT:

| | |
|---|---|
| Grand Jury 1966 | $1,458.24 |
| Petit Jury 1966 | 2,935.08 |
| Meals for Jurors 1966 | —0— |
| Commissioners Drawing Juries 1966 | 1,373.80 |
| Totals for 1966 | $5,767.12 |
| Grand Jury 1967 | $ 1,268.68 |
| Petit Jury 1967 | 8,083.34 |
| Meals for Jurors 1967 | 979.14 |
| Commissioners Drawing Juries 1967 | 2,116.76 |
| Totals for 1967 | $12,447.92 |

NOTE: No Witness Fees included in these totals or Deputies attending Court.

# Annual Report, Shreveport City Court
## Caddo Parish, Louisiana

### 1966 Records of Criminal Section of City Court

### CRIMINAL CASES

| Type of Charge | No. of Cases Filed | No. Cases Disposed of in Court |
|---|---|---|
| Assault | 624 | 601 |
| Concealed Weapon | 227 | 234 |
| Criminal Damage | 110 | 122 |
| Discharge Firearms | 33 | 34 |
| Disturbing the Peace | 996 | 990 |
| Drunk | 2,603 | 2,729 |
| Exposing Person | 38 | 40 |
| Gambling | 221 | 218 |
| Illegal Use of Auto | 60 | 62 |
| Liquor Laws | 15 | 12 |
| Loitering | 52 | 51 |
| Miscl. Ordinances and Codes | 250 | 157 |
| Parole Violator | 1 | 1 |
| Resisting Arrest | 91 | 112 |
| Refusal to Pay Cab | 20 | 23 |
| Simple Battery | 98 | 83 |
| Theft | 907 | 734 |
| Vagrancy | 610 | 672 |
| Vile and Profane | 83 | 100 |
| TOTAL | 7,058 | 6,988 |

| | |
|---|---|
| Peace Bonds Issued and Heard by Court | 74 |
| Bench Warrants Issued by Court | 1,634 |
| Appeals Sent to First District Court | 252 |
| Appeals Disposed of by District Court | 158 |
| Appeals Pending in District Court | 94 |
| Cases Awaiting Trial in City Court, as of January 1, 1967 | 70 |

House Arrest ..... 7 Weekends Sentences..... 36

# Annual Report, Shreveport City Court
## Caddo Parish, Louisiana

### 1966 Records of Criminal Section of City Court

### TRAFFIC CASES

| Type of Charge | No. Tks. Issued | Termi. in V.B. | Termi. in Court |
|---|---|---|---|
| Careless and Reckless | 819 | 330 | 527 |
| Cut Corner | 28 | 22 | 6 |
| Drunken Driving | 298 | 0 | 313* |
| Drivers License | 2,178 | 756 | 1,356 |
| Lane Ordinance | 931 | 778 | 134 |
| Left Turn | 391 | 362 | 36 |
| Leaving Scene | 82 | 1 | 1,082 |
| Mechanical Defects | 6,941 | 5,867 | 1,082 |
| Miscellaneous | 691 | 551 | 178 |
| Negligent Injury | 14 | | 18* |
| One Way Street | 220 | 185 | 33 |
| Red Light | 4,990 | 4,376 | 666 |
| Speeding | 3,293 | 2,454 | 543 |
| Stop Sign | 3,740 | 2,969 | 447 |
| TOTAL | 24,616 | 18,651 | 5,437 |

Total Number of Traffic Cases pending as of January 1, 1967 ..... 279

In 1965 handled 1,792 Non-Record Suits and of Court, Joe C. Hayes ..... $136,131.00

*Included cases pending from 1965.

### 1966 RECORDS OF CIVIL SECTION OF CITY COURT

In 1965 handled 1,792 Non-Record Suit and 1,448 Record Suits.

In 1966 handled 1,532 Non-Record Suits and 1,256 Record Suits.

In Year 1966 took in fees (Court Cost Deposits) amounting to sum of ..... $ 39,945,38

STATE OF LOUISIANA
Parishes of Lincoln and Union

December 1, 1967

Honorable William P. Schuler
Second Assistant Attorney General
State of Louisiana Department of Justice
Supreme Court Building
New Orleans, Louisiana

Dear William:

Replying to your memorandum to all District Attorneys dated November 10, 1967 as amended by a memorandum dated November 14, 1967, this is to report as follows:

1. There have been 3 jury cases tried in my District in the past 2 years.

2. (A) There have been 35 misdemeanor cases tried in the previous 2 years where a possible sentence could exceed 6 months.

   (B) There have been 15 misdemeanor cases tried in the previous 2 years where the sentences actually imposed exceeded 6 months.

3. There has been 1 5-man jury case tried in my Judicial District in the past 2 years.

4. The average delay in a non-jury case as compared to a jury case in my District is 6 months.

5. There would definitely be an insurmountable hardship in attaining jurors in my District if more jury trials were added.

6. There is no way to estimate with any degree of accuracy the cost in my District in having

the 12-man jury in all cases where the punishment exceeds 6 months. However, I would say it could run as high as $35,000.00 or $40,000.00 per year.

Very truly yours,

/s/RAGAN D. MADDEN
District Attorney

RDM:dh

OFFICE OF
THE DISTRICT ATTORNEY
Sixth Judicial District
East Carroll - Madison and Tensas Parishes

November 14, 1967

Honorable Wm. P. Schuler
Assistant Attorney General
104 Supreme Court Building
New Orleans, Louisiana 70112

Dear Mr. Schuler:

Answering catagorically the questions propounded in your letter of November 10 regarding the handling of criminal cases in the Sixth Judicial District, please be advised as follows:

1. Two

2. Approximately 600

3. One

4. Average delay in non-jury cases is one month as compared to six months for jury cases.

5. Yes. It would be almost impossible in this District to process misdemeanors via trial by jury when the sentences would exceed six months.

6. Approximately $160,000.00.

7. Approximately $80,000.00.

I have already advanced my ideas to your office regarding the trial by jury of all misdemeanors when the sentence might exceed six months; however, I will reiterate here.

The processes of administration and functions of

the Court would be brought almost to a stand still since the number of cases to be tried would bring about a complete breakdown in our judicial system. With the limited personnel and facilities available in this District, we could not begin to process or try all cases within a year of their initiation. Thusly, each year would bring about a back log of cases that would result in preventing the defendants from obtaining a speedy trial, as they claim they are entitled to under the provisions of the Constitution. With kind regards, I am

Sincerely yours,

/s/THOMPSON L. CLARKE

TLC/ff

RONALD C. MARTIN
District Attorney
Courthouse Building
P. O. Box 233
Natchitoches, La. 71457

November 16, 1967

Mr. William P. Schuler
Second Assistant Attorney General
104 Supreme Court Building
New Orleans, Louisiana 70112

Dear Bill:

In answer to your letters of November 10th and November 16, 1967, please be advised these are my answers to your questions:

1. Five (5) cases;
2. Thirty-one (31) cases;
3. One (1) case;
4. One month for non-jury—two years for jury cases;
5. Yes. We have no industry, and one parish has only about 40,000 population and the other 12,000;
6. Approximately $75,000.00;
7. This requires no answer, but I must add that because of the lack of time, I did not make an effort to obtain the figures from the Natchitoches City Court.

Trusting this will be of some benefit to you, I remain

Sincerely yours,

/s/ RONALD C. MARTIN
District Attorney

RCM/gbh

November 10, 1967

TO ALL DISTRICT ATTORNEYS:

IN RE:
Gary Duncan v. State of Louisiana
United States Supreme Court
Misc. No. 410

The above numbered and entitled matter has been set for hearing before the United States Supreme Court the week of December 11, 1967.

This case involves the question of jury trial in all misdemeanor cases in which the sentences may exceed a term of six (6) months. It also involves the question of whether a jury has to consist of 12 men and, further, whether the verdict of the jury has to be unanimous.

In conjunction with the District Attorney from Plaquemines Parish, where the case presently arises, we are preparing the brief in this matter.

In connection with the preparation of our brief we would appreciate answers to the following questions.

1. How many jury cases have been tried in your district in the past two years?

2. How many misdemeanor cases, where the penalty exceeded six (6) months, have been tried without a jury in the preceding two years?

3. How many five-man jury cases have been tried in your judicial district in the previous two years?

4. What is the average delay in a non-jury case as compared to a jury case in your district?

5. Would added jury trials work a hardship in obtaining jurors in your district?

6. Can you estimate the cost in your district in having the twelve-man jury in all cases where the punishment exceeds six (6) months?

7. In areas where the city courts try State offenses, please try to add these figures in your compilation.

We would appreciate your prompt answer to these queries and we further solicit any additional advice or suggestion you might have with regard to the manner in which our defenses might be more successfully defended.

Yours very truly,

/s/WILLIAM P. SCHULER
Second Assistant Attorney General
104 Supreme Court Building
New Orleans, Louisiana 70112

State of Louisiana
DEPARTMENT OF JUSTICE
New Orleans, Louisiana

November 14, 1967

TO ALL DISTRICT ATTORNEYS:

IN RE:
Gary Duncan v. State of Louisiana
United States Supreme Court
Misc. No. 410

In reference to our letter of November 10, 1967, requesting certain information, would you kindly amend question No. 2 to read as follows:

> How many misdemeanor cases have been tried in the previous two years in the following categories:
>
> A. Where a possible sentence could exceed six months;
>
> B. Where the sentence actually imposed exceeded six months.

Yours truly,

/s/WILLIAM P. SCHULER
Second Assistant Attorney General

WPS:aeb

B-1200, 12-67

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 12 1968
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 410

RECEIVED
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SUPREME COURT, U.S.

GARY DUNCAN,

*Appellant*,

—v.—

STATE OF LOUISIANA,

*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

## REPLY BRIEF FOR APPELLANT

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January, 1968

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

**No. 410**

GARY DUNCAN,

*Appellant,*

—v.—

STATE OF LOUISIANA,

*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

## REPLY BRIEF FOR APPELLANT

This Reply Brief is limited to two of the questions discussed in the Brief for Appellee: (1) the status of the charge against the appellant as a crime or a petty offense; and (2) the prevailing practice in the states concerning trial by jury in criminal cases.

### I.

### Simple battery under La. Rev. Stat. 14:35 is not a petty offense.

#### A. *The Length of the Sentence Actually Imposed in a Criminal Case Is Not Relevant to a Determination of Whether the Charge Constitutes a Crime or a Petty Offense*

The length of the maximum potential sentence has long been considered by this Court to be one of the relevant

factors in determining whether a charge constituted a crime or a petty offense. See *District of Columbia* v. *Clawans*, 300 U. S. 617, 625-30 (1937); *Schick* v. *United States*, 195 U. S. 65, 67-68 (1904). Appellee has suggested that, in *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966), this Court abandoned this criterion in favor of one that looks to the length of sentence actually imposed after trial. Brief for Appellee pp. 7-9. This position is untenable for several reasons:

*First*, in *Cheff* the Court exercised its supervisory power over the lower federal courts to require jury trial in contempt cases whenever a sentence in excess of six months is imposed. There is no discussion in the opinion of the Court of the contours of the constitutional petty offense rule in non-contempt cases. It is incongruous to suggest that the *Cheff* decision, which greatly expanded the right to trial by jury by extending that right to a class of criminal contempt cases, should be interpreted as implicitly narrowing the constitutional right to trial by jury in all other cases.

*Second*, since there is no maximum potential penalty in criminal contempt cases in federal courts, a rule based on the sentence actually imposed was the only available procedure for distinguishing between serious and minor contempts. In other words, a rule based on potential maximum sentence would result in a jury trial in every contempt case. But see 384 U. S. at 391 (Mr. Justice Douglas, dissenting).

*Third*, a rule which bases the jury trial right on the sentence actually imposed after trial is workable in the contempt area for the reason that the trial judge, in determining to issue the contempt citation or rule to show cause, has the opportunity before the trial to adjudge the serious-

ness of the conduct charged and the likelihood that a term of imprisonment in excess of six months will be the appropriate penalty. By contrast, the trial judge is normally unfamiliar with the facts of a criminal case before it is tried and cannot be expected to determine whether a sentence in excess of six months may be imposed.

In sum, the Court in *Cheff* did not in any way indicate its intention to expand the scope of the petty offense exception to the Sixth Amendment jury trial right. The considerations that support looking to the sentence actually imposed in contempt cases as a determinant of the jury trial right are not applicable to non-contempt cases.

**B. *The Offense Defined by La. Rev. Stat. 14:35 Was Indictable at Common Law and Constitutes Conduct* Malum in Se**

In support of his contention that the charge against him constitutes a crime and not a petty offense, appellant argued that simple battery or its equivalent was indictable at common law and that the offense is *malum in se*. Brief for Appellant, p. 7, n. 3. Appellee has taken issue with both of these propositions.

While recognizing that there were no formal distinctions between more and less serious forms of battery at common law, appellee has argued that only serious forms were indictable and that the minor forms were not. Appellee then asserts that simple battery as defined in La. Rev. Stat. 14:35 constitutes a less serious, non-indictable species of battery. Brief for Appellee, pp. 13-23.

At the outset, it should be made clear that La. Rev. Stat. 14:35, under which appellant was charged, is not limited

to petty or minor batteries. Rather it applies to all batteries, of whatever seriousness, that are committed without a dangerous weapon. For example, in *State* v. *Comeaux*, 249 La. 914, 192 So. 2d 122 (1966), the same conduct for which the defendant had been convicted of simple battery under LA. REV. STAT. 14:35 formed the basis of a charge of attempted murder.[1]

Minor or petty batteries can be punished under Louisiana law as a form of disorderly conduct. LA. REV. STAT. 14:103 (A)(1) ("fistic encounters"—punishable by ninety days in prison). Thus, the distinction that does exist under Louisiana law is one that places simple battery under LA. REV. STAT. 14:35 in the more serious category. Appellee has cited the summary treatment of minor batteries under disorderly conduct statutes in other jurisdictions in support of its argument that the jury trial right does not attach to "petty" batteries. Brief for Appellee, pp. 26-28. In this case, the State could have charged appellant with disorderly conduct under LA. REV. STAT. 14:103(A)(1). Having exercised its discretion to charge a more serious offense, punishable by up to two years imprisonment, it is hardly in a position now to justify its denial of jury trial by arguing that jury trial could properly have been denied if a lesser offense had been charged.

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[1] The only gradation of battery *per se* in the Louisiana Criminal Code is that between Aggravated Battery, defined as battery committed with a dangerous weapon, LA. REV. STAT. 14:34, and simple battery, battery committed without a dangerous weapon. LA. REV. STAT. 14:35. The offense charged in *In re Robinson*, 20 D. C. 570 (Sup. Ct. D. C. 1892), where the Supreme Court of the District of Columbia held the defendant to be entitled to trial by jury under the Sixth Amendment, would be charged as simple battery under Louisiana law.

Apart from the fact that LA. REV. STAT. 14:35 does not define a minor form of battery under Louisiana law, appellee's assertion that Blackstone's references to the indictability of battery are limited to aggravated forms of battery is incorrect. In his discussion of private wrongs, Blackstone defined battery as:

> the unlawful beating of another. The least touching of another's person wilfully, or in anger, is a battery . . .

He then defined "wounding" as a private wrong "which consists in giving another some dangerous hurt, and is only an aggravated species of battery." "Mayhem" is defined as:

> an injury still more atrocious, and consists in violently depriving another of the use of a member proper for his defense in fight. This is a battery attended with this aggravating circumstance . . .

Concluding, Blackstone states:

> And here I must observe that for these four last injuries, assault, battery, wounding, and mayhem, an indictment may be brought.[2]

It is clear that Blackstone was referring to all batteries—including that comprised of "the least touching"—in reporting that battery was indictable.[3]

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[2] III BLACKSTONE, COMMENTARIES * 120-22 (1765).

[3] Appellee's reference at p. 16 of its brief to Blackstone's "qualification" of his discussion on assaults and batteries is misleading. In the passage referred to, Blackstone states that assaults, batteries and wounding are "indictable and punishable with fines and imprisonment or with other ignominious corporal penalties, where they are committed with any very atrocious design." IV *Id.* * 216.

*(footnote continued on following page)*

Thus, appellee's effort to distinguish between more and less serious forms of battery without a dangerous weapon within the meaning of the petty offense exception is unavailing both because LA. REV. STAT. 14:35 does not define a minor form of battery, and because it is quite clear that battery was indictable at common law regardless of the seriousness of the particular offense.[4]

Appellee's argument that battery committed without a dangerous weapon is *malum prohibitum* and not *malum in se* is based largely on the absence of civil disabilities as a result of a conviction of this offense in Louisiana (Brief for Appellee, pp. 34-35), and as such reflects a misunderstanding of these terms. "An act is said to be *malum in se* when it is inherently and essentially evil, that is, immoral in its nature and injurious in its consequences." BLACK, LAW DICTIONARY 1112 (4th ed. 1951). See 2 BOUVIER, LAW DICTIONARY 90 (1839); 1 BLACKSTONE, COMMENTARIES 58. The inquiry focuses on the moral quality of the conduct in question and not on its treatment by the legislature. The "intentional use of force or violence on another" (LA. REV. STAT. 14:33 (definition of battery)) is plainly conduct that is "inherently and essentially evil," entirely without regard to the question of whether a person convicted of this of-

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The "very atrocious design" language defines the circumstances in which corporal punishment was imposed, not, as appellee suggests, the circumstances in which battery was indictable.

[4] In addition to the authorities cited on page 7, note 3 of the Brief for Appellant, the following sources support the conclusion that battery was indictable at common law. R. BURNS, JUSTICE OF THE PEACE 76 (1755); GREENLEAF'S ABRIDGEMENT OF BURN'S JUSTICE OF THE PEACE 30 (Boston 1773); BURN'S ABRIDGEMENT OR THE AMERICAN JUSTICE 52 (Dover, N. H. 1792). See *In re Robinson*, 20 D. C. 570, 571 (Sup. Ct. D. C. 1892). The citation to Hawkins on page 7, note 3 was incorrect and should have been II HAWKINS, PLEAS OF THE CROWN * 369 (6th ed. 1788).

fense can thereafter vote in Louisiana. Moreover, the Louisiana legislature has made known its judgment of the seriousness of the offense by authorizing the imposition of a two year term of imprisonment for its commission.

## II.

**Appellee has not rebutted appellant's showing that a large majority of states guarantee the right to trial before a jury of twelve in all cases punishable in excess of six months.**

In the Brief for Appellant, the prevalence of the right to trial by jury in state criminal procedure is cited as evidence of the fundamental nature of the criminal jury. State practice was referred to for the additional purpose of rebutting any suggestions that the application of the Sixth Amendment jury trial right to the states would impose an intolerable burden on state criminal procedure.

Specifically, appellant contended that thirty-eight states afford a right to trial by a jury of twelve whenever a defendant is charged with an offense punishable in excess of six months.[5] In Section E of its brief (pp. 100-116), appellee discusses the law of numerous jurisdictions in an effort to rebut this contention. But, with the two minor exceptions indicated below, appellee's discussion simply does not meet or contradict the contention of the appellant.

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[5] See Brief for Appellant, pp. 18-19; Appendix B. The six month demarcation was selected not because it is necessarily the applicable test for distinguishing crimes from petty offenses, see *Cheff* v. *Schnackenberg, supra,* 384 U. S. at 387-90 (Mr. Justice Douglas, dissenting), but because it is the only suggested test that would provide a clear standard for surveying state law. See Brief for Appellant, p. 7, n. 3.

On pages 101-107 of appellee's brief, the law of eighteen jurisdictions is discussed, apparently for the purpose of demonstrating that appellant's contention concerning the availability of jury trial in the thirty-eight listed states is "inaccurate and misleading." Five of these jurisdictions—New York, Oregon, Virginia, Virgin Islands and Puerto Rico—are not included in appellant's list of thirty-eight. See Brief for Appellant, Appendix B, pp. 3a-6a. Appellee expressly recognizes that seven others—Alabama, Delaware, Maine, Massachusetts, New Hampshire, North Carolina and Rhode Island—guarantee a criminal defendant the unconditional right to trial *de novo* before a jury meeting the common law requirements in every case in which that right is not available in an inferior court.[6] The right to trial *de novo* by jury on appeal is also guaranteed in three additional states listed by appellee—Arkansas,[7] Maryland[8]

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[6] See Brief for Appellee, pp. 101-108. The question whether a jury trial *de nova* as a matter of right after a bench trial in an inferior court would comply with the Sixth Amendment jury trial guarantee need not be considered on this appeal. It may well be that where neither bond nor delay is excessive, the proceedings in the inferior court would be considered as the equivalent of a preliminary examination. But see *Callan* v. *Wilson*, 127 U. S. 540 (1888). In any event, the fact that the states listed provide for the right to trial *de novo* before a jury, regardless of the proceedings below, demonstrates the rocognition by these states of the importance of providing the jury trial right at some stage of the proceeding. And since the trial *de novo* procedure gives the defendant, at his option, two complete trials, one before a jury, this procedure may be more burdensome than providing the right as an original matter.

[7] ARK. STAT. ANN. Sec. 44-115 (1964) (right to trial by jury in circuit court on appeal from police court); Sec. 44-116 (right to trial by jury in circuit court on appeal from mayor's court).

[8] The Brief for Appellee makes clear that in Maryland a misdemeanor defendant is entitled to trial by jury in the court of the first instance in all except motor vehicle offenses. Pp. 102-103, 144-145. MD. CODE ANN. Art. 66½, Section 325 (1957) provides that motor vehicle convictions may be tried *de novo* at the instance of the

and Minnesota.[9] In two of the remaining three states—Nebraska and New Mexico—the courts referred to by appellee may not impose punishment in excess of six months.[10] In one state, New Jersey, appellee has cited one offense, disorderly persons, which is tried without a jury although a maximum sentence of one year can be imposed.[11] In *State* v. *Maier,* 13 N. J. 235, 99 A. 2d 21 (1953), the Supreme Court of New Jersey in a 4-3 decision determined "disorderly persons" to be a "petty offense" within the meaning of the common law exception.

On pages 109-112 of appellee's brief, the law of twenty-nine jurisdictions is discussed for the purpose of rebutting appellant's contention that, in the thirty-eight states referred to above, the jury that is made available in all cases other than petty offenses is comprised of twelve persons and must render a unanimous verdict. Four of these twenty-nine jurisdictions—Oregon, Texas, Virginia and

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defendant in a criminal court of general jurisdiction. MD. CODE ANN. 66½, Sec. 327 provides that a defendant is entitled to trial by jury on a *de novo* appeal from a motor vehicle violation.

[9] *State* v. *Ketterer,* 248 Minn. 173, 79 N. W. 2d 136 (1956), relied on by appellee, was legislatively overruled by MINN. LAWS 1959, c. 388, sec. 1, now codified as MINN. STAT. sec. 484.63 (Supp. 1966) (appeal *de novo* with jury trial to the district court from every municipal court except Hennepin County). See MINN. STAT. sec. 488A.10(6) (Supp. 1966) (jury trial in Hennepin County Municipal Court).

[10] *Nebraska*: NEB. REV. STAT. Sec. 18-201 (1962) (jurisdiction of police magistrate limited to imposition of three months penalty and $100). See also NEB. REV. STAT. Sec. 29-601 (1962).

*New Mexico*: Prosecutions that are not initiated by either indictment or information may only be brought in the Municipal Court or the Justices of the Peace Court. The jurisdiction of these courts is limited to three months and six months respectively. N. M. STAT. ANN., Sec. 14-16-1(c) (Supp. 1967), Sec. 36-2-5; Sec. 37-1-2, Sec. 38-1-1 (1953).

[11] N. J. STAT. ANN. Sec. 169-4 (1953).

Puerto Rico—are not included in appellant's list of thirty-eight. Appellee expressly recognizes that in ten other states listed—Connecticut, Delaware, Illinois, Kansas, Maryland, Nevada, Ohio, Vermont, Wisconsin, Wyoming—a defendant may be tried before a jury of less than twelve only upon his consent. See Brief for Appellee, pp. 109-112. In two additional states listed by appellee—Missouri and Montana—a jury of less than twelve men may be impaneled only with the consent of the defendant.[12] In seven additional states—Arizona, Michigan, Nebraska, New Mexico, South Dakota, Tennessee and Washington—the jurisdiction of the courts referred to by the appellee is limited to the imposition of sentences of six months or less.[13] The provisions cited in three states—Arkansas, North Dakota and

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[12] *Missouri*: Mo. Rev. Stat. Sec. 543.210 (1959). The constitutional provision cited by appellee for a two-thirds jury verdict applies only in civil cases. Mo. Const., Art. 1, Sec. 22(a).

*Montana*: Mont. Rev. Codes Ann. Sec. 95-1901(c) (1968). The Justice of the Peace Courts, in which six persons compose the jury, are limited to the imposition of penalties not greater than six months. *Id.*, Sec. 95-302.

[13] *Arizona*: Ariz. Rev. Stat. Ann. Sec. 22-301 (Supp. 1967) (Justice of the Peace Court); Sec. 22-402 (1956) (Police Court).

*Michigan*: Mich. Stat. Ann. Sec. 28.1192 (1954) (Justices of the Peace).

*Nebraska*: Neb. Rev. Stat. Sec. 18-201 (1962) (Police Magistrate). There is no provision in Art. 1, Sec. 11 of the Nebraska Constitution for less than 12 jurors in misdemeanor cases.

*New Mexico*: N. M. Stat. Ann. Sec. 36-2-5 (1953) (Justice of the Peace Court).

*South Dakota*: S. D. Code Sec. 32.0922 (Supp. 1960) (Justice of the Peace Court—the only Court not of record).

*Tennessee*: Tenn. Code Ann. Sec. 40-2504 (1955) (six members in circuit courts for offenses not punishable by imprisonment).

*Washington*: Wash. Rev. Code Ann. Sec. 3.20.040 (Justices of the Peace Court); Sections 35.20.030, 35.20.250 (Municipal Courts) (1961).

Colorado—refer only to the trial of civil cases.[14] In two of the remaining three states—Mississippi and North Carolina—there is a right to trial *de novo* before a twelve man jury on appeal in criminal cases tried in inferior courts.[15] Appellee appears correct in noting that notwithstanding a general Georgia statute providing for a twelve man jury in all misdemeanor cases,[16] misdemeanors punishable up to twelve months in the county jail are tried by a jury of five in Fulton County, where Atlanta is situated.[17]

In summary, appellee has shown that in one of the thirty-eight states listed by appellant—New Jersey—disorderly persons offenses, punishable up to one year in prison, are not tried by jury, and that in one county of another—Fulton County in Georgia—misdemeanors punishable up to one year are tried before a jury of five. Thirty-six states remain in which trial by a jury meeting the common law and Sixth Amendment requirements is available in all cases punishable in excess of six months. Eleven additional states provide some jury in all such cases, but, generally in the case of less serious crimes, afford a jury of less than twelve in some cases. Only in Louisiana is all right to trial by

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[14] ARK. STAT. ANN. Sec. 26-608 (Repl. 1962); N. D. CONST. Art. I, Sec. 7. In Colorado, a defendant charged with a misdemeanor may demand a twelve man jury. Rule 123(b), COLO. RULES CRIM. PROC. (1963). The source provisions of COLO. GEN. STAT. Sec. 78-7-4 (1963) make clear that the requirement that fees be advanced to secure more than six jurors applies only in civil cases. COLO. LAWS 1887, ch. 14, Sec. 179, p. 155; LAWS 1891, p. 83.

[15] *Mississippi*: MISS. CODE ANN. Sec. 1202 (1942); *North Carolina*: N. C. GEN. STAT. Secs. 15-177, 15-177.1, Sec. 7-195 (1953).

[16] GA. CODE ANN. Sec. 59-707 (1965).

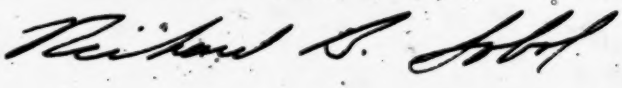
[17] GA. ACTS 1871-2, p. 288; GA. ACTS 1890-1, Vol. 2, p. 938; GA. ACTS 1935, p. 498.

jury denied in a substantial number of serious common law crimes. See Brief for Appellant, Appendix C.[18]

The prevailing practice in a large majority of the American states confirms that trial by jury is considered to be a fundamental right that should be secured by virtue of the due process clause of the Fourteenth Amendment to defendants in state criminal proceedings.

Respectfully submitted,

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November, 1967

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[18] Offenses punishable up to one year in prison in New York City and Disorderly Persons offenses in New Jersey appear to be the only circumstances outside Louisiana where all right to trial by jury is denied in a class of cases where that right would be secured by the application of the Sixth Amendment. See Brief for Appellant, Appendix B, p. 8a.

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No. 410

# In the Supreme Court of the United States

OCTOBER TERM, 1967

GARY DUNCAN,

Appellant,

v.

STATE OF LOUISIANA,

Appellee.

On Appeal from the Supreme Court of Louisiana

## APPLICATION FOR REHEARING

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No. 410

# In the
# Supreme Court of the United States

OCTOBER TERM, 1967

---

GARY DUNCAN,

Appellant,

v.

STATE OF LOUISIANA,

Appellee.

---

**On Appeal from the Supreme Court of Louisiana**

---

## APPLICATION FOR REHEARING

---

Petitioner prays that this Court grant a rehearing of its decision of May 20, 1968, reversing the decision of the Louisiana Supreme Court in this case.

## REASONS FOR GRANTING REHEARING

### I.

The plurality opinion holds that the right to jury trial in "serious criminal cases" in state courts is required by the Sixth and Fourteenth Amendments but shrouds in ambiguity the criteria which a state must use to determine what is a serious criminal case as

distinguished from a petty offense not requiring jury. The opinion merely states on page 14 that the penalty authorized for a particular crime is of major relevance in determining whether it is serious; and that a two year maximum penalty requires a crime to be considered serious (pages 16-17). The opinion admits that the boundaries of the petty offense category have always been ill defined, if not ambulatory (page 15). Yet the opinion flatly refuses to settle the exact location of the line between petty offenses and serious crimes, although it adds to the confusion by hinting on pages 13-14, footnote 30, and page 16 that a maximum penalty of one year may be permissible for the petty offense category, while indicating on pages 14 and 16 that six months may be the limit for the petty offense category.

Since this Honorable Court is now supervising state criminal procedure under the mandate of the Sixth Amendment, it is submitted that the efficient administration of criminal justice in state courts demands a clear definition by this Court of the line of demarcation between petty offenses for which a state need not provide jury trials and serious criminal cases which require jury trials.

## II.

The plurality opinion leaves in doubt whether a twelve-man unanimous jury is necessary for the trial of "serious criminal cases". Footnote 30 on page 13 apparently deals with the question without answering it. (See also concurring opinion of Justice Fortas.) It

is erroneously stated in Footnote 30 that only in Oregon and Louisiana can a less than unanimous jury convict for an offense with a maximum penalty greater than one year.

In Florida, *six-man juries* are provided for *all noncapital* cases. Fla. Stats. Sec. 913.10(1); 1967 Fla. Rules of Crim. Proc. Rule 1.270, Vol. 33 Fla. Stats. Anno.

In South Carolina, *six-man juries* are provided for *all felonies* except murder, manslaughter, rape, arson, burglary, bribery and perjury. S.C. Code Title 15, Sec. 15-612, Sec. 15-618 (1962).

In Texas, *nine out of twelve* jurors may render a verdict in all criminal cases below the grade of felony. Art. V, Sec. 13, Texas Constitution; Art. 37.02, Texas Code of Criminal Procedure. Such cases are not limited to one year's maximum imprisonment. See, Texas Penal Code, Arts. 47, 460, 466 a Sec. 1,530.

In Utah, *eight man juries* are provided for *all noncapital felonies*. Utah Code Anno. Title 78, Secs. 78-46-5 (1953).

In Puerto Rico, nine out of twelve jurors are required to convict of a felony. Art. II, Sec. 11, Puerto Rico Constitution; *People v. Miranda*, 79 D.P.R. 667 (1956).

While indicating in Footnote 30 on pages 13-14 that crimes carrying maximum one year sentences need not be tried by twelve man unanimous juries under the Sixth Amendment, the opinion ignores *D.C.*

*v. Colts*, 282 U.S. 63, which holds that regardless of the brevity of the penalty, if the nature of the offense is serious, it requires the Sixth Amendment twelve-man unanimous jury. Thus, even in those states in which less than twelve-man unanimous juries are restricted to crimes carrying a maximum penalty of one year or less, state criminal process will be affected insofar as those crimes are not considered petty within federal standards. For example the crime of reckless driving was held in *D.C. v. Colts, supra,* to require a twelve man unanimous jury even though the maximum penalty was only thirty days.

Since this Honorable Court is now supervising state criminal procedure under the mandate of the Sixth Amendment, it is submitted that the efficient administration of criminal justice in state courts demands an end to guessing games and a clear answer by this Court to the question whether due process requires a twelve man unanimous jury for the trial of "serious criminal cases".

## III.

The plurality opinion remands this case to the lower court for proceedings not inconsistent with the opinion. Yet the opinion does not answer the vital question whether the lower court must provide a twelve man unanimous jury, together with all the other rigid, arbitrary incidents of a federal court jury trial. How is Louisiana to proceed consistently with this Court's mandate, when this Court refuses to make that mandate clear?

## IV.

Without any basis in prior jurisprudence or in logic, the plurality opinion discards the "fundamental fairness" test as determinative of whether procedural due process requires jury trial in state court. See particularly page 4, note 14, and the concession on page 13: "We would not assert, however, that every criminal trial held before a judge alone is unfair." Although the plurality opinion did not find that the defendant, Duncan, was not accorded a fair and impartial hearing, it reversed his conviction.

Other Sixth Amendment rights which have been applied to the states by this Court have been found necessary to the substance of a fair hearing. *Powell v. Alabama*, 287 U.S. 45; *In re Oliver*, 333 U.S. 257; *Gideon v. Wainwright*, 372 U.S. 335; *Pointer v. Texas*, 380 U.S. 400; *Klopfer v. North Carolina*, 386 U.S. 213; *Washington v. Texas*, 388 U.S. 14. (See dissenting opinion, pages 8, 16).

The plurality opinion has discarded the fairness test in favor of a new test: whether the particular right is "fundamental to the American scheme of justice" (p. 4), or (as variously put in other portions of the opinion) "fundamental in the context of the criminal processes maintained by the American States" (pages 5, note 14) or required by the "deep commitment of the Nation to the right of jury trial" (page 11).

The new "fundamental to the American scheme" test is a euphemism for the imposition of national

uniformity because the major factor used to determine "the American scheme" is what procedure the federal courts and a majority of the states follow. Thus, if the crime of disorderly conduct was subject to bench trial in federal courts and in thirty of the fifty states today, such a procedure would be "fundamental to the American scheme". If, however, in a few years, because of legislative change, only ten states remained which tried disorderly conduct without a jury, these states would no longer be following "the American scheme" and their procedure would be unconstitutional. According to the plurality opinion's new test, state minority views in criminal procedure cannot be tolerated under the constitution, and the rules of procedure desired by the majority must be imposed on the minority.

This new concept created by the plurality opinion is alien to and destructive of our republican system of "checks and balances."

## V.

The plurality opinion on page 15 justifies denying petty offenders jury trials because "the possible consequences" to defendants from convictions for petty offenses are "insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications."

In the name of feasibility and expediency, petty offenders are denied the jury safeguard which the plurality opinion deems fundamental for serious of-

fenders to protect them from "government oppression", "biased judges responsive to the voice of higher authority", "arbitrary law enforcement", and "the corrupt prosecutor". (pages 10-11)

If juries are required to protect serious offenders from official oppression, corrupt prosecutors, and biased judges, then petty offenders who constitute the largest group of lawbreakers, need the same protection.

The result of the plurality opinion is that "liberty" in the due process clause is restricted to the liberty of major offenders.

The Court is in error, in holding a right which can be denied to petty offenders on the ground of expediency, is fundamental to due process. If it is fundamental to "one," it is fundamental to "all".

## VI.

The plurality opinion's cursory history of jury trial is inaccurate and merely an attempted rationalization of the result ultimately reached in the opinion.

Despite the admission (page 8, note 20) that the framers of the Sixth Amendment did not intend the Sixth Amendment jury trial right to bind the states, the opinion concludes that history shows that jury trial is fundamental to the American scheme of justice!

Historically the jury trial right has been subject to legislative diminution in England and in state courts in response to the necessity of easing the burden

of jury trial and crowded court dockets. No satisfactory definition has ever been given of the type of so-called "petty crime" historically subject to bench trial, because historically no such definition has ever existed. (Compare the plurality opinion's concession on page 15 that "the boundaries of the petty offense category have always been ill defined.") For reasons of expediency, the number and kind of nonjury offenses increased through the centuries without reference to any unifying consideration distinguishing the type of offense subject to bench trial.

The underlying principles demonstrated by the history of jury trial are the necessity for flexibility in diminishing the general right to jury trial in the interest of efficiency and the lack of any consistent standards distinguishing nonjury crimes from serious crimes.

Despite the fact that history fails to support a clear distinction between nonjury offenses and serious crimes, and despite the fact that this Court itself is unable to make such a distinction, the plurality opinion fashions a constitutional mandate for jury trial around this questionable distinction and makes it binding on the states.

It is submitted that a valid distinction between serious crimes and petty offenses is a prerequisite to a holding that jury trial is constitutionally required in state courts for serious crimes but not petty offenses. It is further submitted that in the absence of such a distinction, the holding of the plurality opinion is based on a fallacy.

Neither reason, logic nor law dictates that a state should be required to equate its penalties for "petty offenses" (still undefined) subsurvient to those crimes defined by another sovereign, namely the federal government.

## CONCLUSIONS

For the reasons set forth above it is respectfully urged that a rehearing be granted and that upon such rehearing appellant's conviction and the judgment of the state court below be affirmed.

Respectfully submitted,

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## CERTIFICATE

I, William P. Schuler, a member of the Bar of the United States Supreme Court, do hereby certify that the above and foregoing application for rehearing is presented in good faith and not for delay.

WILLIAM P. SCHULER

## CERTIFICATE OF SERVICE

I, William P. Schuler, a member of the Bar of the United States Supreme Court, do hereby certify that a copy of the above and foregoing petition for rehearing has been served on counsel for appellant:

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by placing same in the United States Mail, properly addressed to them, with sufficient postage thereto annexed.

New Orleans, Louisiana, this _____ day of _____ 1968.

_____

WILLIAM P. SCHULER

# SUPREME COURT OF THE UNITED STATES

No. 410.—October Term, 1967.

Gary Duncan, Appellant, v. State of Louisiana. } On Appeal From the Supreme Court of Louisiana.

[May 20, 1968.]

Mr. Justice White delivered the opinion of the Court.

Appellant, Gary Duncan, was convicted of simple battery in the Twenty-fifth Judicial District Court of Louisiana. Under Louisiana law simple battery is a misdemeanor, punishable by two years' imprisonment and a $300 fine. Appellant sought trial by jury, but because the Louisiana Constitution grants jury trials only in cases in which capital punishment or imprisonment at hard labor may be imposed,[1] the trial judge denied the request. Appellant was convicted and sentenced to serve 60 days in the parish prison and pay a fine of $150. Appellant sought review in the Supreme Court of Louisiana,

[1] La. Const., Art. VII, § 41:

". . . All cases in which the punishment may not be at hard labor shall . . . be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict."

La. Rev. Stat. § 14:35 (1950):

"Simple battery is a battery, without the consent of the victim, committed without a dangerous weapon.

"Whoever commits a simple battery shall be fined not more than three hundred dollars, or imprisoned for not more than two years, or both."

asserting that the denial of jury trial violated rights guaranteed to him by the United States Constitution. The Supreme Court, finding "no error of law in the ruling complained of," denied appellant a writ of certiorari.[2] Pursuant to 28 U. S. C. § 1257 (2) appellant sought review in this Court, alleging that the Sixth and Fourteenth Amendments to the United States Constitution secure the right to jury trial in state criminal prosecutions where a sentence as long as two years may be imposed. We noted probable jurisdiction,[3] and set the case for oral argument with No. 52, *Bloom* v. *Illinois, post,* p. ——.

Appellant was 19 years of age when tried. While driving on Highway 23 in Plaquemines Parish on October 18, 1966, he saw two younger cousins engaged in a conversation by the side of the road with four white boys. Knowing his cousins, Negroes who had recently transferred to a formerly all-white high school, had reported the occurrence of racial incidents at the school, Duncan stopped the car, got out, and approached the six boys. At trial the white boys and a white onlooker testified, as did appellant and his cousins. The testimony was in dispute on many points, but the witnesses agreed that appellant and the white boys spoke to each other, that appellant encouraged his cousins to break off the encounter and enter his car, and that appellant was about to enter the car himself for the purpose of driving away with his cousins. The whites testified that just before getting in the car appellant slapped Herman Landry, one of the white boys, on the elbow. The Negroes testified that appellant had not slapped Landry, but had merely touched him. The trial judge concluded that the State had proved beyond a reasonable doubt that Duncan had committed simple battery, and found him guilty.

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[2] 250 La. 253, 195 So. 2d 142 (1967).

[3] 389 U. S. 809 (1967).

## I.

The Fourteenth Amendment denies the States the power to "deprive any person of life, liberty, or property, without due process of law." In resolving conflicting claims concerning the meaning of this spacious language, the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment. That clause now protects the right to compensation for property taken by the State;[4] the rights of speech, press, and religion covered by the First Amendment;[5] the Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized;[6] the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination;[7] and the Sixth Amendment rights to counsel,[8] to a speedy[9] and public[10] trial, to confrontation of opposing witnesses,[11] and to compulsory process for obtaining witnesses.[12]

The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those

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[4] *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226 (1897).
[5] See, *e. g.*, *Fiske* v. *Kansas*, 274 U. S. 380 (1927).
[6] See *Mapp* v. *Ohio*, 367 U. S. 643 (1961).
[7] *Malloy* v. *Hogan*, 378 U. S. 1 (1964).
[8] *Gideon* v. *Wainwright*, 372 U. S. 335 (1963).
[9] *Klopfer* v. *North Carolina*, 386 U. S. 213 (1967).
[10] *In re Oliver*, 333 U. S. 257 (1948).
[11] *Pointer* v. *Texas*, 380 U. S. 400 (1965).
[12] *Washington* v. *Texas*, 388 U. S. 14 (1967).

"'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,'" *Powell* v. *Alabama*, 287 U. S. 45, 67 (1932);[13] whether it is "basic in our system of jurisprudence," *In re Oliver*, 333 U. S. 257, 273 (1948); and whether it is "a fundamental right, essential to a fair trial," *Gideon* v. *Wainwright*, 372 U. S. 335, 343–344 (1963); *Malloy* v. *Hogan*, 378 U. S. 1, 6 (1964); *Pointer* v. *Texas*, 380 U. S. 400, 403 (1965). The claim before us is that the right to trial by jury guaranteed by the Sixth Amendment meets these tests. The position of Louisiana, on the other hand, is that the Constitution imposes upon the States no duty to give a jury trial in any criminal case, regardless of the seriousness of the crime or the size of the punishment which may be imposed. Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee.[14] Since we consider the appeal be-

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[13] Quoting from *Hebert* v. *Louisiana*, 272 U. S. 312, 316 (1926).

[14] In one sense recent cases applying provisions of the first eight amendments to the States represent a new approach to the "incorporation" debate. Earlier the Court can be seen as having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection. For example, *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937), stated: "The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty . . . . Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them." The recent cases, on the other hand, have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing con-

fore us to be such a case, we hold that the Constitution was violated when appellant's demand for jury trial was refused.

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temporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty. It is this sort of inquiry that can justify the conclusions that state courts must exclude evidence seized in violation of the Fourth Amendment, *Mapp* v. *Ohio*, 367 U. S. 643 (1961); that state prosecutors may not comment on a defendant's failure to testify, *Griffin* v. *California*, 380 U. S. 609 (1965); and that criminal punishment may not be imposed for the status of narcotics addiction, *Robinson* v. *California*, 370 U. S. 660 (1962). Of immediate relevance for this case are the Court's holdings that the States must comply with certain provisions of the Sixth Amendment, specifically that the States may not refuse a speedy trial, confrontation of witnesses, and the assistance, at state expense if necessary, of counsel. See cases cited in nn. 8–12, *supra*. Of each of these determinations that a constitutional provision originally written to bind the Federal Government should bind the States as well it might be said that the limitation in question is not necessarily fundamental to fairness in every criminal system that might be imagined but is fundamental in the context of the criminal processes maintained by the American States.

When the inquiry is approached in this way the question whether the States can impose criminal punishment without granting a jury trial appears quite different from the way it appeared in the older cases opining that States might abolish jury trial. See, *e. g.*, *Maxwell* v. *Dow*, 176 U. S. 581 (1900). A criminal process which was fair and equitable but used no juries is easy to imagine. It would make use of alternative guarantees and protections which would serve the purposes that the jury serves in the English and American systems. Yet no American State has undertaken to construct such a system. Instead, every American State, including Louisiana, uses the jury extensively, and imposes very serious punishments only after a trial at which the defendant has a right to a jury's verdict. In every State, including Louisiana, the structure and style of the criminal process—the supporting framework and the subsidiary procedures—are of the sort that naturally complement jury trial, and have developed in connection with and in reliance upon jury trial.

The history of trial by jury in criminal cases has been frequently told.[15] It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta.[16] Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689. In the 18th century Blackstone could write:

> "Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the perogative of the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control, by justices of *oyer* and *terminer* occasionally named by the crown; who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure. But the founders of the English law have, with excellent forecast, contrived that . . . the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unani-

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[15] *E. g.*, W. Forsyth, History of Trial by Jury (1852); J. B. Thayer, A Preliminary Treatise on Evidence at the Common Law (1898); W. S. Holdsworth, History of English Law (3d ed. 1922).

[16] *E. g.*, 4 W. Blackstone, Commentaries on the Laws of England 349 (Cooley ed. 1899). Historians no longer accept this pedigree. See, *e. g.*, 1 F. Pollock & F. M. Maitland, The History of English Law Before the Time of Edward I, at 173, n. 3 (2d ed. 1909).

> mous suffrage of twelve of his equals and neighbours, indifferently chosen and superior to all suspicion." [17]

Jury trial came to America with English colonists, and received strong support from them. Royal interference with the jury trial was deeply resented. Among the resolutions adopted by the First Congress of the American Colonies (the Stamp Act Congress) on October 19, 1765—resolutions deemed by their authors to state "the most essential rights and liberties of the colonists" [18]—was the declaration:

> "That trial by jury is the inherent and invaluable right of every British subject in these colonies."

The First Continental Congress, in the resolve of October 14, 1774, objected to trials before judges dependent upon the Crown alone for their salaries and to trials in England for alleged crimes committed in the colonies; the Congress therefore declared:

> "That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." [19]

The Declaration of Independence stated solemn objections to the King making "judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries," to his "depriving us, in many cases, of the benefits of trial by jury," and to his "transporting us beyond the seas to be tried for pretended offenses." The Constitution itself, in Art. III, § 2, commanded:

> "The Trial of all Crimes, except in cases of Impeachment, shall be by Jury; and such Trial shall be held

[17] *Id.*, at 349–350.

[18] R. Perry, ed., Sources of Our Liberties 270 (1959).

[19] *Id.*, at 288.

> in the State where the said Crimes shall have been committed."

Objections to the Constitution because of the absence of a bill of rights were met by the immediate submission and adoption of the Bill of Rights. Included was the Sixth Amendment which, among other things, provided:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." [20]

The constitutions adopted by the original States guaranteed jury trial. Also, the constitution of every State entering the Union thereafter in one form or another protected the right to jury trial in criminal cases.

Even such skeletal history is impressive support for considering the right to jury trial in criminal cases to be fundamental to our system of justice, an importance frequently recognized in the opinions of this Court. For example, the Court has said:

> "Those who emigrated to this country from England brought with them this great privilege 'as their

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[20] Among the proposed amendments adopted by the House of Representatives in 1789 and submitted to the Senate was Article Fourteen:

"No State shall infringe the right of trial by Jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press."

The Senate deleted this article in adopting the amendments which became the Bill of Rights. Journal of the First Session of the Senate 72 (1820); 1 Annals of Congress 76 (1834); Brennan, The Bill of Rights and the States, in E. Cahn, The Great Rights 69 (1963); E. Dumbauld, The Bill of Rights 46, 215 (1957). This relatively clear indication that the framers of the Sixth Amendment did not intend its jury trial requirement to bind the States is, of course, of little relevance to interpreting the Due Process Clause

> birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.' "[21]

Jury trial continues to receive strong support. The laws of every State guarantee a right to jury trial in serious criminal cases; no State has dispensed with it; nor are there significant movements underway to do so. Indeed, the three most recent state constitutional revisions, in Maryland, Michigan, and New York, carefully preserved the right of the accused to have the judgment of a jury when tried for a serious crime.[22]

We are aware of prior cases in this Court in which the prevailing opinion contains statements contrary to our holding today that the right to jury trial in serious criminal cases is a fundamental right and hence must be recognized by the States as part of their obligation to extend due process of law to all persons within their jurisdiction. Louisiana relies especially on *Maxwell* v. *Dow*, 176 U. S. 581 (1900); *Palko* v. *Connecticut*, 302 U. S. 319 (1937); and *Snyder* v. *Massachusetts*, 291 U. S. 97 (1934). None of these cases, however, dealt with a State which had purported to dispense entirely with a jury trial in serious criminal cases. *Maxwell* held that

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of the Fourteenth Amendment, adopted specifically to place limitations upon the States. Cf. *Fiske* v. *Kansas*, 274 U. S. 380 (1927); *Gitlow* v. *New York*, 268 U. S. 652, 666 (1925).

[21] *Thompson* v. *Utah*, 170 U. S. 343, 349–350 (1898), quoting 2 J. Story, Commentaries on the Constitution of the United States § 1779. See also *Irvin* v. *Dowd*, 366 U. S. 717, 721–722 (1961); *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 16 (1955); *Ex parte Milligan*, 4 Wall. 2, 122–123 (1866); *People* v. *Garbutt*, 17 Mich. 9, 27 (1868).

[22] Proposed Maryland Constitution, Art. 1, § 1.07 (defeated at referendum May 14, 1968); Michigan Constitution, Art. 1, § 14; Proposed New York Constitution, Art. 1, § 7b (defeated at referendum Nov. 7, 1967).

no provision of the Bill of Rights applied to the States—a position long since repudiated—and that the Due Process Clause of the Fourteenth Amendment did not prevent a State from trying a defendant for a noncapital offense with fewer than 12 men on the jury. It did not deal with a case in which no jury at all had been provided. In neither *Palko* nor *Snyder* was jury trial actually at issue, although both cases contain important dicta asserting that the right to jury trial is not essential to ordered liberty and may be dispensed with by the States regardless of the Sixth and Fourteenth Amendments. These observations, though weighty and respectable, are nevertheless dicta, unsupported by holdings in this Court that a State may refuse a defendant's demand for a jury trial when he is charged with a serious crime. Perhaps because the right to jury trial was not directly at stake, the Court's remarks about the jury in *Palko* and *Snyder* took no note of past or current developments regarding jury trials, did not consider its purposes and functions, attempted no inquiry into how well it was performing its job, and did not discuss possible distinctions between civil and criminal cases. In *Malloy* v. *Hogan*, *supra*, the Court rejected *Palko*'s discussion of the self-incrimination clause. Respectfully, we reject the prior dicta regarding jury trial in criminal cases.

The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.[23]

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[23] "The [jury trial] clause was clearly intended to protect the accused from oppression by the Government . . . ." *Singer* v. *United States*, 380 U. S. 24, 31 (1965).

". . . The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to

Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.

Of course jury trial has "its weaknesses and the potential for misuse," *Singer* v. *United States*, 380 U. S. 24, 35 (1965). We are aware of the long debate, especially in this century, among those who write about the admin-

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leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives." P. Devlin, Trial by Jury 164 (1956).

istration of justice, as to the wisdom of permitting untrained laymen to determine the facts in civil and criminal proceedings.[24] Although the debate has been intense, with powerful voices on either side, most of the controversy has centered on the jury in civil cases. Indeed, some of the severest critics of civil juries acknowledge that the arguments for criminal juries are much stronger.[25] In addition, at the heart of the dispute have been express or implicit assertions that juries are incapable of adequately understanding evidence or determining issues of fact, and that they are unpredictable, quixotic, and little better than a roll of dice. Yet, the most recent and exhaustive study of the jury in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them and that when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.[26]

The State of Louisiana urges that holding that the Fourteenth Amendment assures a right to jury trial will cast doubt on the integrity of every trial conducted without a jury. Plainly, this is not the import of our holding. Our conclusion is that in the American States, as in the federal judicial system, a general grant of jury trial for

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[24] A thorough summary of the arguments that have been made for and against jury trial and an extensive bibliography of the relevant literature is available at Hearings on Recording of Jury Deliberations before the Subcommittee to Investigate the Administration of the Internal Security Act of the Senate Committee on the Judiciary, 84th Cong., 1st Sess., pp. 63–81 (1955). A more selective bibliography appears at H. Kalven, Jr. & H. Zeisel, The American Jury 4, n. 2 (1966).

[25] *E. g.*, J. Frank, Courts on Trial 145 (1949); H. Sidgwick, The Elements of Politics 498 (4th ed. 1919).

[26] Kalven & Zeisel, n. 23, *supra*.

serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants. We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury. Thus we hold no constitutional doubts about the practices, common in both federal and state courts, of accepting waivers of jury trial [27] and prosecuting petty crimes without extending a right to jury trial.[28] However, the fact is that in most places more trials for serious crimes are to juries than to a court alone; a great many defendants prefer the judgment of a jury to that of a court.[29] Even where defendants are satisfied with bench trials, the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely.[30]

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[27] See *Patton* v. *United States*, 281 U. S. 276 (1930).

[28] See Part II, *infra*.

[29] Kalven & Zeisel, n. 23, *supra*, c. 2.

[30] Louisiana also asserts that if due process is deemed to include the right to jury trial, States will be obligated to comply with all past interpretations of the Sixth Amendment, an amendment which in its inception was designed to control only the federal courts and which throughout its history has operated in this limited environment where uniformity is a more obvious and immediate consideration. In particular, Louisiana objects to application of the decisions of this Court interpreting the Sixth Amendment as guaranteeing a 12-man jury in serious criminal cases, *Thompson* v. *Utah*, 170 U. S. 343 (1898); as requiring a unanimous verdict before guilt can be found, *Maxwell* v. *Dow*, 176 U. S. 581, 586 (1900); and as barring procedures by which crimes subject to the Sixth Amendment jury trial provision are tried in the first instance without a jury but at the first appellate stage by *de novo* trial with a jury, *Callan* v. *Wilson*, 127 U. S. 540, 557 (1888). It seems very unlikely to us that our decision today will require widespread changes in state criminal processes. First, our decisions interpreting the Sixth Amendment are always subject to reconsideration, a fact amply demonstrated by the instant decision. In addition, most of the

## II.

Louisiana's final contention is that even if it must grant jury trials in serious criminal cases, the conviction before us is valid and constitutional because here the petitioner was tried for simple battery and was sentenced to only 60 days in the parish prison. We are not persuaded. It is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision [31] and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States. Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses, *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966). But the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment. *District of Columbia* v.

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States have provisions for jury trials equal in breadth to the Sixth Amendment, if that amendment is construed, as it has been, to permit the trial of petty crimes and offenses without a jury. Indeed, there appear to be only four States in which juries of fewer than 12 can be used without the defendant's consent for offenses carrying a maximum penalty of greater than one year. Only in Oregon and Louisiana can a less-than-unanimous jury convict for an offense with a maximum penalty greater than one year. However 10 States authorize first-stage trials without juries for crimes carrying lengthy penalties; these States give a convicted defendant the right to a *de novo* trial before a jury in a different court. The statutory provisions are listed in the briefs filed in this case.

[31] *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966); *District of Columbia* v. *Clawans*, 300 U. S. 617 (1937); *Schick* v. *United States*, 195 U. S. 65 (1904); *Natal* v. *Louisiana*, 139 U. S. 621 (1891); see *Callan* v. *Wilson*, 127 U. S. 540 (1888). See generally Frankfurter & Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917 (1926); Kaye, Petty Offenders Have No Peers!, 26 U. Chi. L. Rev. 245 (1959).

*Clawans*, 300 U. S. 617 (1937). The penalty authorized by the law of the locality may be taken "as a gauge of its social and ethical judgments," 300 U. S., at 628, of the crime in question. In *Clawans* the defendant was jailed for 60 days, but it was the 90-day authorized punishment on which the Court focused in determining that the offense was not one for which the Constitution assured trial by jury. In the case before us the Legislature of Louisiana has made simple battery a criminal offense punishable by imprisonment for two years and a fine. The question, then is whether a crime carrying such a penalty is an offense which Louisiana may insist on trying without a jury.

We think not. So-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions. There is no substantial evidence that the Framers intended to depart from this established common-law practice, and the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications. These same considerations compel the same result under the Fourteenth Amendment. Of course the boundaries of the petty offense category have always been ill defined, if not ambulatory. In the absence of an explicit constitutional provision, the definitional task necessarily falls on the courts, which must either pass upon the validity of legislative attempts to identify those petty offenses which are exempt from jury trial or, where the legislature has not addressed itself to the problem, themselves face the question in the first instance. In either case it is necessary to draw a line in the spectrum of crime, separating petty from serious

infractions. This process, although essential, cannot be wholly satisfactory, for it requires attaching different consequences to events which, when they lie near the line, actually differ very little.

In determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial, we are counseled by *District of Columbia* v. *Clawans, supra,* to refer to objective criteria, chiefly the existing laws and practices in the Nation. In the federal system, petty offenses are defined as those punishable by no more than six months in prison and a $500 fine.[32] In 49 of the 50 States crimes subject to trial without a jury, which occasionally include simple battery, are punishable by no more than one year in jail.[33] Moreover, in the late 18th century in America crimes triable without a jury were for the most part punishable by no more than a six-month prison term, although there appear to have been exceptions to this rule.[34] We need not, however, settle in this case the exact location of the line between petty offenses and serious crimes. It is sufficient for our purposes to hold

[32] 18 U. S. C. § 1.

[33] Indeed, there appear to be only two instances, aside from the Louisiana scheme, in which a State denies jury trial for a crime punishable by imprisonment for longer than six months. New Jersey's disorderly conduct offense, N. J. Stat. Ann. § 2A:169–4 (1953), carries a one-year maximum sentence but no jury trial. The denial of jury trial was upheld by a 4–3 vote against state constitutional attack in *State* v. *Maier,* 13 N. J. 235, 99 A. 2d 21 (1953). New York State provides a jury within New York City only for offenses bearing a maximum sentence greater than one year. See *People* v. *Sanabria,* 42 Misc. 2d 464, 249 N. Y. S. 2d 66 (Sup. Ct. 1964).

[34] Frankfurter & Corcoran, n. 31, *supra.* In the instant case Louisiana has not argued that a penalty of two years imprisonment is sufficiently short to qualify as a "petty offense," but only that the penalty actually imposed on Duncan, imprisonment for 60 days, is within the petty offense category.

that a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense.[35] Consequently, appellant was entitled to a jury trial and it was error to deny it.

The judgment below is reversed and the case is remanded for proceedings not inconsistent with this opinion.

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[35] It is argued that *Cheff* v. *Schnackenberg*, 384 U. S. 373 (1966), interpreted the Sixth Amendment as meaning that to the extent that the length of punishment is a relevant criterion in distinguishing between serious crimes and petty offenses, the critical factor is not the length of the sentence authorized but the length of the penalty actually imposed. In our view that case does not reach the situation where a legislative judgment as to the seriousness of the crime is imbedded in the statute in the form of an express authorization to impose a heavy penalty for the crime in question. *Cheff* involved criminal contempt, an offense applied to a wide range of conduct including conduct not so serious as to require jury trial absent a long sentence. In addition criminal contempt is unique in that legislative bodies frequently authorize punishment without stating the extent of the penalty which can be imposed. The contempt statute under which *Cheff* was prosecuted, 18 U. S. C. § 401, treated the extent of punishment as a matter to be determined by the forum court. It is therefore understandable that this Court in *Cheff* seized upon the penalty actually imposed as the best evidence of the seriousness of the offense for which *Cheff* was tried.

# SUPREME COURT OF THE UNITED STATES

No. 410.—October Term, 1967.

Gary Duncan, Appellant,
*v.*
State of Louisiana.
} On Appeal From the Supreme Court of Louisiana.

[May 20, 1968.]

Mr. Justice Black, with whom Mr. Justice Douglas joins, concurring.

The Court today holds that the right to trial by jury guaranteed defendants in criminal cases in federal courts by Art. III of the United States Constitution and by the Sixth Amendment is also guaranteed by the Fourteenth Amendment to defendants tried in state courts. With this holding I agree for reasons given by the Court. I also agree because of reasons given in my dissent in *Adamson* v. *California*, 332 U. S. 46, 68. In that dissent, at 332 U. S. 90, I took the position, contrary to the holding in *Twining* v. *New Jersey*, 211 U. S. 78, that the Fourteenth Amendment made all of the provisions of the Bill of Rights applicable to the States. This Court in *Palko* v. *Connecticut*, 302 U. S. 319, 323, decided in 1937, although saying "there is no such general rule," went on to add that the Fourteenth Amendment may make it unlawful for a State to abridge by its statutes the

> "'freedom of speech which the First Amendment safeguards against encroachment by the Congress . . . or the like freedom of the press . . . or the free exercise of religion . . . or the right of peaceable assembly . . . or the right of one accused of crime to the benefit of counsel . . . .' In these and other situations immunities that are valid as against the federal government by force of the specific pledges

> of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the States." *Id.*, 302 U. S., at 324, 325.

And the *Palko* opinion went on to explain, at 302 U. S. 326, that certain Bill of Rights' provisions were made applicable to the States by bringing them "within the Fourteenth Amendment by a process of absorption." Thus *Twining* v. *New Jersey, supra,* refused to hold that any one of the Bill of Rights' provisions was made applicable to the States by the Fourteenth Amendment, but *Palko,* which must be read as overruling *Twining* on this point, concluded that the Bill of Rights' Amendments that are "implicit in the concept of ordered liberty" are "absorbed" by the Fourteenth as protections against state invasion. In this situation I said in *Adamson* v. *California,* 332 U. S., at 89, that while "I would extend to all the people of the nation the complete protection of the Bill of Rights," that "[i]f the choice must be between the selective process of the *Palko* decision applying some of the Bill of Rights to the States, or the *Twining* rule applying none of them, I would choose the *Palko* selective process." See *Gideon* v. *Wainwright,* 372 U. S. 335. And I am very happy to support this selective process through which our Court has since the *Adamson* case held most of the specific Bill of Rights' protections applicable to the States to the same extent they are applicable to the Federal Government. Among these are the right to trial by jury decided today, the right against compelled self-incrimination, the right to counsel, the right to compulsory process for witnesses, the right to confront witnesses, the right to a speedy and public trial, and the right to be free from unreasonable searches and seizures.

All of these holdings making Bill of Rights' provisions applicable as such to the States mark, of course,

a departure from the *Twining* doctrine holding that none of those provisions were enforceable as such against the States. The dissent in this case, however, makes a spirited and forceful defense of that now discredited doctrine. I do not believe that it is necessary for me to repeat the historical and logical reasons for my challenge to the *Twining* holding contained in my *Adamson* dissent and Appendix to it. What I wrote there in 1947 was the product of years of study and research. My appraisal of the legislative history followed 10 years of legislative experience as a Senator of the United States, not a bad way, I suspect, to learn the value of what is said in legislative debates, committee discussions, committee reports, and various other steps taken in the course of passage of bills, resolutions, and proposed constitutional amendments. My Brother HARLAN's objections to my *Adamson* dissent history, like that of most of the objectors, relies most heavily on a criticism written by Professor Charles Fairman and published in the Stanford Law Review. 2 Stan. L. Rev. 5 (1949). I have read and studied this article extensively, including the historical references, but am compelled to add that in my view it has completely failed to refute the inferences and arguments that I suggested in my *Adamson* dissent. Professor Fairman's "history" relies very heavily on what was *not* said in the state legislatures that passed on the Fourteenth Amendment. Instead of relying on this kind of negative pregnant, my legislative experience has convinced me that it is far wiser to rely on what *was* said, and most importantly, said by the men who actually sponsored the Amendment in the Congress. I know from my years in the United States Senate that it is to men like Congressman Bingham, who steered the Amendment through the House, and Senator Howard, who introduced it in the Senate, that mem-

bers of Congress look when they seek the real meaning of what is being offered. And they vote for or against a bill based on what the sponsors of that bill and those who oppose it tell them it means. The historical appendix to my *Adamson* dissent leaves no doubt in my mind that both its sponsors and those who opposed it believed the Fourteenth Amendment made the first eight Amendments of the Constitution (The Bill of Rights) applicable to the States.

In addition to the adoption of Professor Fairman's "history," the dissent states that "the great words of the four clauses of the first section of the Fourteenth Amendment would have been an exceedingly peculiar way to say that 'The rights heretofore guaranteed against federal intrusion by the first eight amendments are henceforth guaranteed against State intrusion as well.'" Dissenting opinion, n. 9. In response to this I can say only that the words "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" seems to me an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States.[1] What more precious "privilege" of American citizenship could there be than that privilege to claim the protections of our great Bill of Rights? I suggest that any reading of "privileges or immunities of citizens of the United States" which excludes the Bill of Rights' safeguards renders the words of this section of the Fourteenth Amendment meaningless. Senator Howard, who introduced the Fourteenth Amendment for passage in the Senate, certainly read the words this way. Although I have cited his speech at length in my *Adamson* dissent

[1] My view has been and is that the Fourteenth Amendment, *as a whole*, makes the Bill of Rights applicable to the States. This would certainly include the language of the Privileges and Immunities Clause, as well as the Due Process Clause.

appendix, I believe it would be worthwhile to reproduce a part of it here.

"Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution [the Senator had just read from the old opinion of *Corfield* v. *Coryell*, 4 Washington's Circuit Ct. Reports 371, 6 Fed. Cases 546 (E. D. Penna. 1823)]. To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and to bear arms; the right to be exempted from the quartering of soldiers in a house without the consent of the owner; the right to be exempt from unreasonable searches and seizures, and from any search on seizure except by virtue of a warrant issued upon a formal oath or affidavit; the right of an accused person to be informed of the nature of the accusation against him, and his right to be tried by an impartial jury of the vicinage; and also the right to be secure against excessive bail and against cruel and unusual punishments.

"Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution; and it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guaran-

> tied by the Constitution or recognized by it, are secured to the citizens solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation.
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> ". . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect those great fundamental guarantees." Cong. Globe, 39th Cong., 1st Sess. (1865), 2765.

From this I conclude, contrary to my Brother HARLAN, that if anything, it is "exceedingly peculiar" to read the Fourteenth Amendment differently from the way I do.

While I do not wish at this time to discuss at length my disagreement with Brother HARLAN's forthright and frank restatement of the now discredited *Twining* doctrine,[2] I do want to point out what appears to me to be the basic difference between us. His view, as was indeed the view of *Twining*, is that "due process is an evolving concept" and therefore that it entails a "gradual process of judicial inclusion and exclusion" to ascertain those "immutable principles of free government which no member of the Union may disregard." Thus the Due Process Clause is treated as prescribing no specific and clearly ascertainable constitutional command that judges must obey in interpreting the Constitution, but rather as leaving judges free to decide at any particular time whether a particular rule or judicial formulation embodies an "immutable principle[s] of free government" or "is implicit in the concept of ordered liberty," or whether certain conduct "shocks the judge's conscience" or runs counter to some other similar, unde-

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[2] For a more thorough exposition of my views against this approach to the Due Process Clause, see my concurring opinion in *Rochin* v. *California*, 342 U. S. 165, 174.

fined and undefinable standard. Thus due process, according to my Brother HARLAN, is to be a word with no permanent meaning, but one which is found to shift from time to time in accordance with judges' predilections and understandings of what is best for the country. If due process means this, the Fourteenth Amendment, in my opinion, might as well have been written that "no person shall be deprived of life, liberty or property except by laws that the judges of the United States Supreme Court shall find to be consistent with the immutable principles of free government." It is impossible for me to believe that such unconfined power is given to judges in our Constitution that is a written one in order to limit governmental power.

Another tenet of the *Twining* doctrine as restated by my Brother HARLAN is that "due process of law requires only fundamental fairness." But the "fundamental fairness" test is one on a par with that of shocking the conscience of the Court. Each of such tests depends entirely on the particular judge's idea of ethics and morals instead of requiring him to depend on the boundaries fixed by the written words of the Constitution. Nothing in the history of the phrase "due process of law" suggests that constitutional controls are to depend on any particular judge's sense of values. The origin of the Due Process Clause is Chapter 39 of Magna Carta which declares that "No free man shall be taken, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the *law of the land.*" (Emphasis added.) [3] As early as 1354 the words "due process of law" were used in an English statute interpreting Magna Carta,[4] and by the end of the 14th cen-

[3] See *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 Howard 272, 276.

[4] 28 Edw. 3, c. 3 (1354).

tury "due process of law" and "law of the land" were interchangeable. Thus the origin of this clause was an attempt by those who wrote Magna Carta to do away with the so-called trials of that period where people were liable to sudden arrest and summary conviction in courts and by judicial commissions with no sure and definite procedural protections and under laws that might have been improvised to try their particular cases. Chaper 39 of Magna Carta was a guarantee that the government would take neither life, liberty, nor property without a trial in accord with the law of the land that already existed at the time the alleged offense was committed. This means that the Due Process Clause gives all Americans, whoever they are and wherever they happen to be, the right to be tried by independent and unprejudiced courts using established procedures and applying valid pre-existing laws. There is not one word of legal history that justifies making the term "due process of law" mean a guarantee of a trial free from laws and conduct which the courts deem at the time to be "arbitrary," "unreasonable," "unfair," or "contrary to civilized standards." The due process of law standard for a trial is one tried in accordance with the Bill of Rights and laws passed pursuant to constitutional power, guaranteeing to all alike a trial under the general law of the land.

Finally I want to add that I am not bothered by the argument that applying the Bill of Rights to the States, "according to the same standards that protect those rights against federal encroachment,"[5] interferes with our concept of federalism in that it may prevent States from trying novel social and economic experiments. I have never believed that under the guise of federalism the States should be able to experiment with the pro-

[5] See *Malloy* v. *Hogan*, 378 U. S. 1, 10; *Pointer* v. *Texas*, 380 U. S. 400, 406; *Miranda* v. *Arizona*, 384 U. S. 436, 464.

tections afforded our citizens through the Bill of Rights. As Justice Goldberg said so wisely in his concurring opinion in *Pointer* v. *Texas*, 380 U. S. 400:

> ". . . to deny to the States the power to impair a fundamental constitutional right is not to increase federal power, but, rather, to limit the power of both federal and state governments in favor of safeguarding the fundamental rights and liberties of the individual. In my view this promotes rather than undermines the basic policy of avoiding excess concentration of power in government, federal or state, which underlies our concepts of federalism." 380 U. S., at 414.

It seem to me totally inconsistent to advocate on the one hand, the power of this Court to strike down any state law or practice which it finds "unreasonable" or "unfair," and on the other hand urge that the States be given maximum power to develop their own laws and procedures. Yet the due process approach of my Brothers HARLAN and FORTAS (see other concurring opinion) does just that since in effect it restricts the States to practices which a majority of this Court is willing to approve on a case-by-case basis. No one is more concerned than I that the States be allowed to use the full scope of their powers as their citizens see fit. And that is why I have continually fought against the expansion of this Court's authority over the States through the use of a broad, general interpretation of due process that permits judges to strike down state laws they do not like.

In closing I want to emphasize that I believe as strongly as ever that the Fourteenth Amendment was intended to make the Bill of Rights applicable to the States. I have been willing to support the selective incorporation doctrine, however, as an alternative, although perhaps less historically supportable than

complete incorporation. The selective incorporation process, if used properly, does limit the Supreme Court in the Fourteenth Amendment field to specific Bill of Rights' protections only and keeps judges from roaming at will in their own notions of what policies outside the Bill of Rights are desirable and what are not. And, most importantly for me, the selective incorporation process has the virtue of having already worked to make most of the Bill of Rights' protections applicable to the States.

# SUPREME COURT OF THE UNITED STATES

NOS. 410 AND 52.—OCTOBER TERM, 1967.

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| Gary Duncan, Appellant,<br>410 *v.*<br>State of Louisiana. | On Appeal From the Supreme Court of Louisiana. |
| S. Edward Bloom,<br>Petitioner,<br>52 *v.*<br>State of Illinois. | On Writ of Certiorari to the Supreme Court of Illinois. |

[May 20, 1968.]

MR. JUSTICE FORTAS, concurring.

I join the judgments and opinions of the Court in these cases because I agree that the Due Process Clause of the Fourteenth Amendment requires that the States accord the right to jury trial in prosecutions for offenses that are not petty. A powerful reason for reaching this conclusion is that the Sixth Amendment to the Constitution guarantees the right to jury trial in federal prosecutions for such offenses. It is, of course, logical and reasonable that in seeking, from time to time, the content of "due process of law," we should look to and be guided by the great Bill of Rights in our Constitution. Considerations of the practice of the forum States, of the States generally, and of the history and office of jury trials are also relevant to our task. I believe, as my Brother WHITE's opinion for the Court in *Duncan* v. *Louisiana* persuasively argues, that the right to jury trial in major prosecutions, state as well as federal, is so fundamental to the protection of justice and liberty that "due process of law" cannot be accorded without it.

It is the progression of history, and especially the deepening realization of the substance and procedures that justice and the demands of human dignity require,

which has caused this Court to invest the command of "due process of law" with increasingly greater substance. The majority lists outstanding stations in this progression, *ante*, p. 3. This Court has not been alone in its progressive recognition of the content of the great phrase which my Brother WHITE describes as "spacious language" and Learned Hand called a "majestic generality." The Congress, state courts, and state legislatures have moved forward with the advancing conception of human rights in according procedural as well as substantive rights to individuals accused of conflict with the criminal laws.*

But although I agree with the decision of the Court, I cannot agree with the implication, see n. 30, *ante*, that the tail must go with the hide: that when we hold, influenced by the Sixth Amendment, that "due process" requires that the States accord the right of jury trial for all but petty offenses, we automatically import all of the ancillary rules which have been or may hereafter be developed incidental to the right to jury trial in the federal courts. I see no reason whatever, for example, to assume that our decision today should require us to impose federal requirements such as unanimous verdicts or a jury of 12 upon the States. We may well conclude that these and other features of federal jury practice are by no means fundamental—that they are not essential to due process of law—and that they are not obligatory on the States.

I would make these points clear today. Neither logic nor history nor the intent of the draftsmen of the Four-

*See, *e. g.*, Bail Reform Act of 1966, Pub. L. 89–465, 18 U. S. C. § 3141 *et seq.*; Criminal Justice Act of 1964, Pub. L. 88–455, 18 U. S. C. § 3006A; Jury Selection and Service Act of 1968, Pub. L. 90, —, 36 U. S. L. W. 85; *Schowgurow* v. *State*, 240 Md. 121 (1964); Note, The Proposed Penal Law of New York, 64 Col. L. Rev. 1469 (1964).

teenth Amendment can possibly be said to require that the Sixth Amendment or its jury trial provision be applied to the States together with the total gloss that this Court's decisions have supplied. The draftsmen of the Fourteenth Amendment intended what they said, not more or less: that no State shall deprive any person of life, liberty, or property without due process of law. It is ultimately the duty of this Court to interpret, to ascribe specific meaning to this phrase. There is no reason whatever for us to conclude that, in so doing, we are bound slavishly to follow not only the Sixth Amendment but all of its bag and baggage, however securely or insecurely affixed they may be by law and precedent to federal proceedings. To take this course, in my judgment, would be not only unnecessary but mischievous because it would inflict a serious blow upon the principle of federalism. The Due Process Clause commands us to apply its great standard to state court proceedings to assure basic fairness. It does not command us rigidly and arbitrarily to impose the exact pattern of federal proceedings upon the 50 States. On the contrary, the Constitution's command, in my view, is that in our insistence upon state observance of due process, we should, so far as possible, allow the greatest latitude for state differences. It requires, within the limits of the lofty basic standards that it prescribes for the States as well as the Federal Government, maximum opportunity for diversity and minimal imposition of uniformity of method and detail upon the States. Our Constitution sets up a federal union, not a monolith.

This Court has heretofore held that various provisions of the Bill of Rights such as the freedom of speech and religion guarantees of the First Amendment, the prohibition of unreasonable searches and seizures in the Fourth Amendment, the privilege against self-incrimination of

the Fifth Amendment, and the right to counsel and to confrontation under the Sixth Amendment "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those rights against federal encroachment." *Malloy* v. *Hogan*, 378 U. S. 1, 10 (1964); *Pointer* v. *Texas*, 380 U. S. 400, 406 (1965); *Miranda* v. *Arizona*, 384 U. S. 436, 464 (1966). I need not quarrel with the specific conclusion in those specific instances. But unless one adheres slavishly to the incorporation theory, body and substance, the same conclusion need not be superimposed upon the jury trial right. I respectfully but urgently suggest that it should not be. Jury trial is more than a principle of justice applicable to individual cases. It is a system of administration of the business of the State. While we may believe (and I do believe) that the right of jury trial is fundamental, it does not follow that the particulars of according that right must be uniform. We should be ready to welcome state variations which do not impair—indeed, which may advance—the theory and purpose of trial by jury.

# SUPREME COURT OF THE UNITED STATES

No. 410.—October Term, 1967.

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| Gary Duncan, Appellant, *v.* State of Louisiana. | On Appeal From the Supreme Court of Louisiana. |

[May 20, 1968.]

Mr. Justice Harlan, whom Mr. Justice Stewart joins, dissenting.

Every American jurisdiction provides for trial by jury in criminal cases. The question before us is not whether jury trial is an ancient institution, which it is; nor whether it plays a significant role in the administration of criminal justice, which it does; nor whether it will endure, which it shall. The question in this case is whether the State of Louisiana, which provides trial by jury for all felonies, is prohibited by the Constitution from trying charges of simple battery to the court alone. In my view, the answer to that question, mandated alike by our constitutional history and by the longer history of trial by jury, is clearly "no."

The States have always borne primary responsibility for operating the machinery of criminal justice within their borders, and adapting it to their particular circumstances. In exercising this responsibility, each State is compelled to conform its procedures to the requirements of the Federal Constitution. The Due Process Clause of the Fourteenth Amendment requires that those procedures be fundamentally fair in all respects. It does not, in my view, impose or encourage nationwide uniformity for its own sake; it does not command adherence to forms that happen to be old; and it does not impose on the States the rules than may be in force in the federal courts except where such rules are also found to be essential to basic fairness.

The Court's approach to this case is an uneasy and illogical compromise among the views of various Justices on how the Due Process Clause should be interpreted. The Court does not say that those who framed the Fourteenth Amendment intended to make the Sixth Amendment applicable to the States. And the Court concedes that it finds nothing unfair about the procedure by which the present appellant was tried. Nevertheless, the Court reverses his conviction: it holds, for some reason not apparent to me, that the Due Process Clause incorporates the particular clause of the Sixth Amendment that requires trial by jury in federal criminal cases—including, as I read its opinion, the sometimes trivial accompanying baggage of judicial interpretation in federal contexts. I have raised my voice many times before against the Court's continuing undiscriminating insistence upon fastening on the States federal notions of criminal justice,[1] and I must do so again in this instance. With all respect, the Court's approach and its reading of history are altogether topsy-turvy.

I.

I believe I am correct in saying that every member of the Court for at least the last 135 years has agreed that our Founders did not consider the requirements of the Bill of Rights so fundamental that they should operate directly against the States.[2] They were wont to believe rather that the security of liberty in America rested primarily upon the dispersion of governmental

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[1] See, *e. g.*, my opinions in *Mapp* v. *Ohio*, 367 U. S. 643, 672 (dissenting); *Ker* v. *California*, 374 U. S. 23, 44 (concurring); *Malloy* v. *Hogan*, 378 U. S. 1, 14 (dissenting); *Pointer* v. *Texas*, 380 U. S. 400, 408 (concurring); *Griffin* v. *California*, 380 U. S. 609, 615 (concurring); *Klopfer* v. *North Carolina*, 386 U. S. 213, 226 (concurring).

[2] *Barron* v. *Baltimore*, 7 Pet. 243 (1833), held that the first eight Amendments restricted only federal action.

power across a federal system.[3] The Bill of Rights was considered unnecessary by some[4] but insisted upon by others in order to curb the possibility of abuse of power by the strong central government they were creating.[5]

The Civil War Amendments dramatically altered the relation of the Federal Government to the States. The first section of the Fourteenth Amendment imposes highly significant restrictions on state action. But the restrictions are couched in very broad and general terms: citizenship, privileges and immunities; due process of law; equal protecttion of the laws. Consequently, for 100 years this Court has been engaged in the difficult process Professor Jaffe has well called "the search for intermediate premises."[6] The question has been, "Where does the Court properly look to find the specific rules that define and give content to such terms as 'life, liberty, or property' and 'due process of law'?"

A few members of the Court have taken the position that the intention of those who drafted the first section of the Fourteenth Amendment was simply, and exclusively, to make the provisions of the first eight amendments applicable to state action.[7] This view has never been

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[3] The *locus classicus* for this viewpoint is The Federalist No. 51 (Madison).

[4] The Bill of Rights was opposed by Hamilton and other proponents of a strong central government. See The Federalist No. 84; see generally Rossiter, 1787: The Grand Convention 284, 302–303.

[5] In *Barron* v. *Baltimore*, *supra*, at 250, Chief Justice Marshall said, "These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments."

[6] Jaffe, Was Brandeis an Activist? The Search for Intermediate Premises, 80 Harv. L. Rev. 986 (1967).

[7] See *Adamson* v. *California*, 332 U. S. 56, 71 (dissenting opinion of BLACK, J.); *O'Neil* v. *Vermont*, 144 U. S. 323, 366, 370 (dissenting opinion of Harlan, J.) (1892); Black, Due Process of Law, Second Carpentier Lecture delivered at Columbia University Law School on March 21, 1968.

accepted by this Court. In my view, often expressed elsewhere,[8] the first section of the Fourteenth Amendment was meant neither to incorporate, nor to be limited to, the specific guarantees of the first eight amendments. The overwhelming historical evidence marshalled by Professor Fairman demonstrates, to me conclusively, that the Congressmen and state legislators who wrote, debated, and ratified the Fourteenth Amendment did not think they were "incorporating" the Bill of Rights[9] and

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[8] In addition to the opinions cited in n. 2, *supra*, see, *e. g.*, my opinions in *Poe* v. *Ullman*, 367 U. S. 497, 522, at 539–545 (dissenting), and *Griswold* v. *Connecticut*, 381 U. S. 479, 499 (concurring).

[9] Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949). Professor Fairman was not content to rest upon the overwhelming fact that the great words of the four clauses of the first section of the Fourteenth Amendment would have been an exceedingly peculiar way to say that "The rights heretofore guaranteed against federal intrusion by the first eight Amendments are henceforth guaranteed against state intrusion as well." He therefore sifted the mountain of material comprising the debates and committee reports relating to the Amendment in both Houses of Congress and in the state legislatures that passed upon it. He found that in the immense corpus of comments on the purpose and effects of the proposed amendment, and on its virtues and defects, there is almost no evidence whatever for "incorporation." The first eight amendments are so much as mentioned by only two members of Congress, one of whom effectively demonstrated (a) that he did not understand *Barron* v. *Baltimore*, 7 Pet. 243, and therefore did not understand the question of incorporation, and (b) that he was not himself understood by his colleagues. One state legislative committee report, rejected by the legislature as a whole, found § I of the Fourteenth Amendment superfluous because it duplicated the Bill of Rights: the committee obviously did not understand *Barron* v. *Baltimore* either. That is all Professor Fairman could find, in hundreds of pages of legislative discussion prior to passage of the Amendment, that even suggests incorporation.

To this negative evidence the judicial history of the Amendment could be added. For example, it proved possible for a court whose

the very breadth and generality of the Amendment's provisions suggests that its authors did not suppose that the Nation would always be limited to mid-19th century conceptions of "liberty" and "due process of law" but that the increasing experience and evolving conscience of the American people would add new "intermediate premises." In short, neither history, nor sense, supports using the Fourteenth Amendment to put the States in a constitutional straitjacket with respect to their own development in the administration of criminal or civil law.

Although I therefore fundamentally disagree with the total incorporation view of the Fourteenth Amendment, it seems to me that such a position does at least have the virtue, lacking in the Court's selective incorporation approach, of internal consistency: we look to the Bill of Rights, word for word, clause for clause, precedent for precedent because, it is said, the men who wrote the Amendment wanted it that way. For those who do not accept this "history," a different source of "intermediate premises" must be found. The Bill of Rights is not necessarily irrelevant to the search for guidance in interpreting the Fourteenth Amendment, but the reason for and the nature of its relevance must be articulated.

Apart from the approach taken by the absolute incorporationists, I can see only one method of analysis that has any internal logic. That is to start with the words "liberty" and "due process of law" and attempt to define them in a way that accords with American traditions and

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members had lived through Reconstruction to reiterate the doctrine of *Barron* v. *Baltimore*, that the Bill of Rights did not apply to the States, without so much as questioning whether the Fourteenth Amendment had any effect on the continued validity of that principle. *E. g., Walker* v. *Sauvinet*, 92 U. S. 90; see generally Morrison, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation, 2 Stan. L. Rev. 140 (1949).

our system of government. This approach, involving a much more discriminating process of adjudication than does "incorporation," is, albeit difficult, the one that was followed throughout the Ninteenth and most of the present century. It entails a "gradual process of judicial inclusion and exclusion," [10] seeking, with due recognition of constitutional tolerance for state experimentation and disparity, to ascertain those "immutable principles of free government which no member of the Union may disregard." [11] Due process was not restricted to rules fixed in the past, for that "would be to deny every quality of the law but its age, and to render it incapable of progess or improvement." [12] Nor did it impose nation-wide uniformty in details, for

> "[t]he Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of the line there may be a right of trial by jury, and on the other side there may be no such right. Each State prescribes its own modes of judicial proceeding." [13]

Through this gradual process, this Court sought to define "liberty" by isolating freedoms that Americans of the past and of the present considered more important than any suggested countervailing public objective. The Court also, by interpretation of the phrase "due process of law," enforced the Constitution's guarantee that no State may imprison an individual except by fair and impartial procedures.

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[10] *Davidson* v. *New Orleans*, 96 U. S. 97, 104.
[11] *Holden* v. *Hardy*, 166 U. S. 366, 389.
[12] *Hurtado* v. *California*, 110 U. S. 516, 529.
[13] *Missouri* v. *Lewis*, 101 U. S. 22, 31.

The relationship of the Bill of Rights to this "gradual process" seems to me to be twofold. In the first place it has long been clear that the Due Process Clause imposes some restrictions on state action that parallel Bill of Rights restrictions on federal action. Second, and more important than this accidental overlap, is the fact that the Bill of Rights is evidence, at various points, of the content Americans find in the term "liberty" and of American standards of fundamental fairness.

An example, both of the phenomenon of parallelism and the use of the first eight amendments as evidence of a historic commitment, is found in the partial definition of "liberty" offered by Mr. Justice Holmes, dissenting in *Gitlow* v. *New York*, 268 U. S. 652:

> "The general principle of free speech . . . must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States." *Id.*, at 672.

As another example, Mr. Justice Frankfurter, speaking for the Court in *Wolf* v. *Colorado*, 338 U. S. 25, at 27, recognized that

> "[t]he security of one's own privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."

The Court has also found among the procedural requirements of "due process of law" certain rules paralleling requirements of the first eight amendments. For

example, in *Powell* v. *Alabama*, 287 U. S. 45, the Court ruled that a State could not deny counsel to an accused in a capital case:

> "The fact that the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . . . is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, *although* it be specifically dealt with in another part of the federal Constitution." *Id.*, at 67. (Emphasis added.)

Later, the right to counsel was extended to all felony cases.[14] The Court has also ruled, for example, that "due process" means a speedy process, so that liberty will not be long restricted prior to an adjudication, and evidence of fact will not become stale;[15] that in a system committed to the resolution of issues of fact by adversary proceedings the right to confront opposing witnesses must be guaranteed;[16] and that if issues of fact are tried to a jury, fairness demands a jury impartially selected.[17] That these requirements are fundamental to procedural fairness hardly needs redemonstration.

In all of these instances, the right guaranteed against the States by the Fourteenth Amendment was one that had also been guaranteed against the Federal Government by one of the first eight amendments. The logically critical thing, however, was not that the rights had

[14] *Gideon* v. *Wainwright*, 372 U. S. 335. The right to counsel was found in the Fourteenth Amendment because, the Court held, it *was* essential to a fair trial. See 372 U. S., at 342–345.

[15] *Klopfer* v. *North Carolina*, 386 U. S. 213.

[16] *Pointer* v. *Texas*, 380 U. S. 400.

[17] *Irvin* v. *Dowd*, 366 U. S. 717.

been found in the Bill of Rights, but that they were deemed, in the context of American legal history, to be fundamental. This was perhaps best explained by Mr. Justice Cardozo, speaking for a Court that included Chief Justice Hughes and Justices Brandeis and Stone, in *Palko* v. *Connecticut*, 302 U. S. 319:

> "If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed." *Id.*, at 326.

Referring to *Powell* v. *Alabama*, *supra*, Mr. Justice Cardozo continued:

> "The decision did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a federal court. The decision turned upon the fact that in the particular situation laid before us in the evidence, the benefit of counsel was essential to the substance of a hearing." *Id.*, at 327.

Mr. Justice Cardozo then went on to explain that the Fourteenth Amendment did not impose on each State every rule of procedure that some other State, or the federal courts, thought desirable, but only those rules critical to liberty:

> "[t]he line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even

> so, they are not of the very essence of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of *our people* as to be ranked as fundamental.' . . . Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them." *Id.*, at 325. (Emphasis added).

Today's Court still remains unwilling to accept the total incorporationists' view of the history of the Fourteenth Amendment. This, if accepted, would afford a cogent reason for applying the Sixth Amendment to the States. The Court is also, apparently, unwilling to face the task of determining whether denial of trial by jury in the situation before us, or in other situations, is fundamentally unfair. Consequently, the Court has compromised on the ease of the incorporationist position, without its internal logic. It has simply assumed that the question before us is whether the Jury Trial Clause of the Sixth Amendment should be incorporated into the Fourteenth, jot-for-jot and case-for-case, or ignored. Then the Court merely declares that the clause in question is "in" rather than "out." [18]

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[18] The same illogical way of dealing with a Fourteenth Amendment problem was employed in *Malloy* v. *Hogan*, 378 U. S. 1, which held that the Due Process Clause guaranteed the protection of the Self-Incrimination Clause of the Fifth Amendment against state action. I disagreed at that time both with the way the question was framed and with the result the Court reached. See my dissenting opinion, *id.*, at 14. I consider myself bound by the Court's holding in *Malloy* with respect to self-incrimination. See my concurring opinion in *Griffin* v. *California*, 380 U. S. 609, 615. I do not think that *Malloy* held, nor would I consider myself bound by a holding, that every question arising under the Due Proces Clause shall be settled by an arbitrary decision whether a clause in the Bill of Rights is "in" or "out."

The Court has justified neither its starting place nor its conclusion. If the problem is to discover and articulate the rules of fundamental fairness in criminal proceedings, there is no reason to assume that the whole body of rules developed in this Court constituting Sixth Amendment jury trial must be regarded as a unit. The requirement of trial by jury in federal criminal cases has given rise to numerous subsidiary questions respecting the exact scope and content of the right. It surely cannot be that every answer the Court has given, or will give, to such a question is attributable to the Founders; or even that every rule announced carries equal conviction of this Court; still less can it be that every such subprinciple is equally fundamental to ordered liberty.

Examples abound. I should suppose it obviously fundamental to fairness that a "jury" means an "impartial jury." [19] I should think it equally obvious that the rule, imposed long ago in the federal courts, that "jury" means "jury of exactly twelve," [20] is not fundamental to anything: there is no significance except to mystics in the number 12. Again, trial by jury has been held to require a unanimous verdict of jurors in the federal courts,[21] although unanimity has not been found essential

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[19] The Court has so held in, *e. g.*, *Irvin* v. *Dowd*, 366 U. S. 717. Compare *Dennis* v. *United States*, 339 U. S. 162.

[20] *E. g.*, *Rassmussen* v. *United States*, 197 U. S. 516.

[21] *E. g.*, *Andres* v. *United States*, 333 U. S. 740. With respect to the common-law number and unanimity requirements, the Court suggests that these present no problem because "our decisions interpreting the Sixth Amendment are always subject to reconsideration . . . ." *Ante*, p. —, n. 30. These examples illustrate a major danger of the "incorporation" approach—that provisions of the Bill of Rights may be watered down in the needless pursuit of uniformity. Cf. my concurring opinion in *Ker* v. *California*, 374 U. S. 23, 44. MR. JUSTICE WHITE alluded to this problem in his dissenting opinion in *Malloy* v. *Hogan*, *supra*, at p. 38.

to liberty in Britain, where the requirement has been abandoned.[22]

One further example is directly relevant here. The co-existence of a requirement of jury trial in federal criminal cases and a historic and universally recognized exception for "petty crimes" has compelled this Court, on occasion, to decide whether a particular crime is petty, or is included within the guarantee.[23] Individual cases have been decided without great conviction and without reference to a guiding principle. The Court today holds, for no discernible reason, that if and when the line is drawn its exact location will be a matter of such fundamental importance that it will be uniformly imposed on the States. This Court is compelled to decide such obscure borderline questions in the course of administering federal law. This does not mean that its decisions are demonstrably sounder than those that would be reached by state courts and legislatures, let alone that they are of such importance that fairness demands their imposition throughout the Nation.

Even if I could agree that the question before us is whether Sixth Amendment jury trial is totally "in" or totally "out," I can find in the Court's opinion no real reasons for concluding that it should be "in." The basis for differentiating among clauses in the Bill of Rights cannot be that only some clauses are in the Bill of Rights, or that only some are old and much praised, or that only some have played an important role in the development of federal law. These things are true of all. The Court says that some clauses are more "fundamental" than others, but it turns out to be using this word in a sense

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[22] Criminal Justice Act of 1967, § 13.

[23] *E. g., Callan* v. *Wilson*, 127 U. S. 540; *District of Columbia* v. *Clawans*, 300 U. S. 617; *District of Columbia* v. *Colts*, 282 U. S. 63.

that would have astonished Mr. Justice Cardozo and which, in addition, is of no help. The word does not mean "analytically critical to procedural fairness" for no real analysis of the role of the jury in making procedures fair is even attempted. Instead, the word turns out to mean "old," "much praised," and "found in the Bill of Rights." The definition of "fundamental" thus turns out to be circular.

II.

Since, as I see it, the Court has not even come to grips with the issues in this case, it is necessary to start from the beginning. When a criminal defendant contends that his state conviction lacked "due process of law," the question before this Court, in my view, is whether he was denied any element of fundamental procedural fairness. Believing, as I do, that due process is an evolving concept and that old principles are subject to re-evaluation in light of later experience, I think it appropriate to deal on its merits with the question whether Louisiana denied appellant due process of law when it tried him for simple assault without a jury.

The obvious starting place is the fact that this Court has, in the past, *held* that trial by jury is not a requisite of criminal due process. In the leading case, *Maxwell* v. *Dow*, 176 U. S. 581, Mr. Justice Peckham wrote as follows for the Court: [24]

> Trial by jury has never been affirmed to be a necessary requisite of due process of law. . . . The

[24] The precise issue in *Maxwell* was whether a jury of eight rather than 12 jurors could be employed in criminal prosecutions in Utah. The Court held that this was permissible because the Fourteenth Amendment did not require the States to provide trial by jury at all. The Court seems to think this was dictum. As a technical matter, however, a statement that is critical to the chain of reasoning by which a result is in fact reached does not become dictum simply because a later court can imagine a totally different

> right to be proceeded against only by indictment, and the right to a trial by twelve jurors, are of the same nature, and are subject to the same judgment, and the people in the several States have the same right to provide by their organic law for the change of both or either. . . . [T]he State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. The legislation in question is not, in our opinion, open to either of these objections." *Id.*, at 603–605.

In *Hawaii* v. *Mankichi*, 190 U. S. 203, the question was whether the Territory of Hawaii could continue its pre-annexation procedure of permitting conviction by non-unanimous juries. The Congressional Resolutuion of Annexation had provided that municipal legislation of Hawaii that was not contrary to the United States Constitution could remain in force. The Court interpreted the resolution to mean only that those requirements of the Constitution that were "fundamental" would be binding in the Territory. After concluding that a municipal statute allowing a conviction of treason on circumstantial evidence *would* violate a "fundamental" guarantee of the Constitution, the Court continued:

> "We would even go farther, and say that most, if not all, the privileges and immunities in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our

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way of deciding the case. See *Jordan* v. *Massachusetts*, 225 U. S. 167, 176, citing *Maxwell* for the proposition that "the requirement of due process does not deprive a State of the power to dispense with jury trial altogether."

> decision of this case upon the ground that the two rights alleged to be violated in this case [Sixth Amendment jury trial and grand jury indictment] are not fundamental in their nature but concern merely a method of procedure which sixty years of practice has shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well-being." *Id.*, at 217–218.

Numerous other cases in this Court have assumed that jury trial is not fundamental to ordered liberty.[25]

Although it is of course open to this Court to re-examine these decisions, I can see no reason why they should now be overturned. It can hardly be said that time has altered the question, or brought significant new evidence to bear upon it. The virtues and defects of the jury system have been hotly debated for a long time,[26] and are hotly debated today, without significant change in the lines of argument.[27]

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[25] *E. g., Irvin* v. *Dowd*, 366 U. S. 717, 721; *Fay* v. *New York*, 332 U. S. 261, 288; *Palko* v. *Connecticut*, *supra*, at 325; *Snyder* v. *Massachusetts*, 291 U. S. 97, 105; *Brown* v. *New Jersey*, 175 U. S. 172, 175; *Missouri* v. *Lewis*, *supra*, at 31.

[26] *E. g.*, Deady, Trial by Jury, 17 Am. L. Rev. 398, 399–400 (1883):

> "Still in these days of progress and experiment, when everything is on trial at the bar of human reason or conceit, it is quite the fashion to speak of jury trial as something that has outlived its usefulness. Intelligent and well-meaning people often sneer at it as an awkward and useless impediment to the speedy and correct administration of justice, and a convenient loop-hole for the escape of powerful and popular rogues. Considering the kind of jury trials we sometimes have in the United States, it must be admitted that this criticism is not without foundation."

[27] See generally Kalven, Memorandum Regarding Jury System, printed in Hearings on Recording of Jury Deliberations before the Subcommittee to Investigate the Administration of the Internal

The argument that jury trial is not a requisite of due process is quite simple. The central proposition of *Palko, supra,* a proposition to which I would adhere, is that "due process of law" requires only that criminal trials be fundamentally fair. As stated above, apart from the theory that it was historically intended as a mere shorthand for the Bill of Rights, I do not see what else "due process of law" can intelligibly be thought to mean. If due process of law requires only fundamental fairness,[28] then the inquiry in each case must be whether a state trial process was a fair one. The Court has held, properly I think, that in an adversary process it is a requisite of fairness, for which there is no adequate substitute, that a criminal defendant be afforded a right to counsel and to cross-examine opposing witnesses. But it simply has not been demonstrated, nor, I think, can it be demonstrated, that trial by jury is the only fair means of resolving issues of fact.

The jury is of course not without virtues. It affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law.[29] It eases the burden on judges

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Security Act of the Senate Committee on the Judiciary, 84th Cong., 1st Sess., pp. 63–81. In particular,

"the debate has been going on for a long time (at least since 1780) and the arguments which were advanced pro and con haven't changed much in the interim. Nor, contrary to my first impression, does there seem to be any particular period in which the debate grows hotter or colder. It has always been a hot debate." *Id.,* at 63.

[28] See, *e. g., Snyder* v. *Massachusetts,* 291 U. S. 97, 107–108 (Cardozo, J.):

"So far as the Fourteenth Amendment is concerned, the presence of a defendant [at trial] is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."

[29] The point is made by, among others, Tocqueville. 1 Democracy in America 285 (Reeve tr.).

by enabling them to share a part of their sometimes awesome responsibility.[30] A jury may, at times, afford a higher justice by refusing to enforce harsh laws (although it necessarily does so haphazardly, raising the questions whether arbitrary enforcement of harsh laws is better than total enforcement, and whether the jury system is to be defended on the ground that jurors sometimes disobey their oaths).[31] And the jury may, or may not, contribute desirably to the willingness of the general public to accept criminal judgments as just.[32]

It can hardly be gainsaid, however, that the principal original virtue of the jury trial—the limitations a jury imposes on a tyrannous judiciary—has largely disappeared. We no longer live in a medieval or colonial society. Judges enforce laws enacted by democratic decision, not by regal fiat. They are elected by the people or appointed by the people's elected officials, and are responsible not to a distant monarch alone but to reviewing courts, including this one.[33]

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[30] The argument is developed by Curtis, The Trial Judge and the Jury, 5 Vand. L. Rev. 150 (1952). For example,

"Juries relieve the judge of the embarrassment of making the necessary exceptions. They do this, it is true, by violating their oaths, but this, I think, is better than tempting the judge to violate his oath of office." *Id.*, at 157.

[31] See generally, G. Williams, The Proof of Guilt 257–263; W. Forsyth, History of Trial by Jury 261.

[32] See J. Stephen, A General View of the Criminal Law of England 208–209.

[33] See, *e. g.*, Sunderland, The Inefficiency of the American Jury, 13 Mich. L. Rev. 302, 305:

"But times have changed, and the government itself is now under the absolute control of the people. The judges, if appointed, are selected by the agents of the people, and if elected are selected by the people directly. The need for the jury as a political weapon of defense has been steadily diminishing for a hundred years, until now the jury must find some other justification for its continuance."

The jury system can also be said to have some inherent defects, which are multiplied by the emergence of the criminal law from the relative simplicity that existed when the jury system was devised.[34] It is a cumbersome process, not only imposing great cost in time and money on both the State and the jurors themselves,[35] but also contributing to delay in the machinery of justice.[36] Untrained jurors are presumably less adept at reaching accurate conclusions of fact than judges, particularly if the issues are many or complex.[37] And it is argued by some that trial by jury, far from increasing public respect for law, impairs it: the average man, it is said, reacts favorably neither to the notion that matters he knows to be complex are being decided by other average men,[38] nor to the way the jury system distorts the process of adjudication.[39]

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[34] See, *e. g.*, Sunderland, *op. cit. supra*, at 303:

"Life was simple when the jury system was young, but with the steadily growing complexity of society and social practices, the facts which enter into legal controversies have become much more complex."

[35] Compare Green, Jury Injustice, 20 Jurid. Rev. 132, 133.

[36] Cf. Lummus, Civil Juries and the Law's Delay, 12 B. U. L. Rev. 487.

[37] See, *e. g.*, McWhorter, Abolish the Jury, 57 Am. L. Rev. 42. Statistics on this point are difficult to accumulate for the reason that the only way to measure jury performance is to compare the result reached by a jury with the result the judge would have reached in the same case. While judge-jury comparisons have many values, it is impossible to obtain a statistical comparison of accuracy in this manner. See generally H. Kalven and H. Zeisel, The American Jury, *passim*.

[38] *E. g.*, Boston, Some Practical Remedies for Existing Defects in the Administration of Justice, 61 U. Pa. L. Rev. 1, 16:

"There is not one important personal or property interest, outside of a Court of justice, which any of us would willingly commit to the first twelve men that come along the street . . . ."

[39] *E. g.*, McWhorter, *op. cit. supra*, at 46:

"It is the jury system that consumes time at the public expense in gallery playing and sensational and theatrical exhibitions before

That trial by jury is not the only fair way of adjudicating criminal guilt is well attested by the fact that it is not the prevailing way, either in England or in this country. For England, one expert makes the following estimates. Parliament generally provides that new statutory offenses, unless they are of "considerable gravity" shall be tried to judges; consequently, summary offenses now outnumber offenses for which jury trial is afforded by more than six to one. Then, within the latter category, 84% of all cases are in fact tried to the court. Over all, "the ratio of defendants actually tried by jury becomes in some years little more than 1 per cent." [40]

In the United States, where it has not been as generally assumed that jury waiver is permissible,[41] the statistics are only slightly less revealing. Two experts have estimated that, of all prosecutions for crimes triable to a jury, 75% are settled by guilty plea and 40% of the remainder are tried to the court.[42] In one State, Maryland, which has always provided for waiver, the rate of court trial appears in some years to have reached 90%.[43] The Court recognizes the force of these statistics in stating,

> "We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be

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the jury, whereby the public interest and the dignity of the law are swallowed up in a morbid, partisan or emotional personal interest in the parties immediately concerned."

[40] Williams, *supra*, at 302.

[41] For example, in the federal courts the right of the defendant to waive a jury was in doubt as recently as 1930, when it was established in *Patton* v. *United States*, 281 U. S. 276. It was settled in New York only in 1957, *People* v. *Carroll*, 7 Misc. 2d 581, aff'd, 3 N. Y. 2d 686.

[42] Kalven and Zeisel, *supra*, at 12–32.

[43] See Oppenheim, Waiver of Trial by Jury in Criminal Cases, 25 Mich. L. Rev. 695, 728.

> as fairly treated by a judge alone as he would be by a jury." *Ante*, p. 13.

I agree. I therefore see no reason why this Court should reverse the conviction of appellant, absent any suggestion that his particular trial was in fact unfair, or compel the State of Louisiana to afford jury trial in an as yet unbounded category of cases that can, without unfairness, be tried to a court.

Indeed, even if I were persuaded that trial by jury is a fundamental right in some criminal cases, I could see nothing fundamental in the rule, not yet formulated by the Court that places the prosecution of appellant for simple battery within the category of "jury crimes" rather than "petty crimes." Trial by jury is ancient, it is true. Almost equally ancient, however, is the discovery that, because of it,

> "the King's most loving Subjects are much travailed and otherwise encumbered in coming and keeping of the said six Weeks Sessions, to their Costs, Charges, Unquietness." [44]

As a result, through the long course of British and American history, summary procedures have been used in a varying category of lesser crimes as a flexible response to the burden jury trial would otherwise impose.

The use of summary procedures has long been widespread. British procedure in 1776 exempted from the requirement of jury trial

> "[v]iolations of the laws relating to liquor, trade and manufacture, labor, smuggling, traffic on the highway, the Sabbath, 'cheats,' gambling, swearing, small thefts, *assaults*, offenses to property, servants and seamen, vagabondage . . . . [and] at least a hundred more . . . ." (Emphasis added.)[45]

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[44] 37 Hen. VIII, c. 7.

[45] Franfurter and Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917,

Penalties for such offenses included heavy fines (with imprisonment until they were paid), whippings, and imprisonment at hard labor.[46]

Nor had the Colonies a cleaner slate, although practices varied greatly from place to place with conditions. In Massachusetts, crimes punishable by whipping (up to 10 strokes), the stocks (up to three hours), the ducking stool, and fines and imprisonment were triable to magistrates.[47] The decision of a magistrate could, in theory, be appealed to a jury, but a stiff recognizance made exercise of this right quite rare.[48] New York was somewhat harsher. For example, "anyone adjudged by two magistrates to be an idle, disorderly or vagrant person might be transported whence he came, and on reappearance be whipped from constable to constable with 31 lashes by each."[49] Anyone committing a criminal offense "under the degree of Grand Larceny" and unable to furnish bail within 48 hours could be summarily tried by three justices.[50] With local variations, examples could be multiplied.

The point is not that many offenses that English-speaking communities have, at one time or another, regarded as triable without a jury are more serious, and carry more serious penalties, than the one involved here. The point is rather that until today few people would have thought the exact location of the line mattered very much. There is no obvious reason why a jury trial is a requisite of fundamental fairness when the charge is robbery, and not a requisite of fairness when the same

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928. The source of the authors' information is Burn, Justice of the Peace (1776).

[46] Frankfurter and Corcoran, *supra*, at 930–934.

[47] See, *id.*, at 938–942.

[48] *Ibid.*

[49] Frankfurter and Corcoran, *supra*, at 945. They refer to the Vagrancy Act of 1721, 2 Col. L. (N. Y.) 56.

[50] Frankfurter and Corcoran, *supra*, at 945.

defendant, for the same actions, is charged with assault and petit theft.[51] The reason for the historic exception for relatively minor crimes is the obvious one: the burden of jury trial was thought to outweigh its marginal advantages. Exactly why the States should not be allowed to make continuing adjustments, based on the state of their criminal dockets and the difficulty of summoning jurors, simply escapes me.

In sum, there is a wide range of views on the desirability of trial by jury, and on the ways to make it most effective when it is used; there is also considerable variation from State to State in local conditions such as the size of the criminal caseload, the ease or difficulty of summoning jurors, and other trial conditions bearing on fairness. We have before us, therefore, an almost perfect example of a situation in which the celebrated dictum of Mr. Justice Brandeis should be invoked. It is, he said,

> "one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory . . . ." *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 280, 311 (dissenting opinion).

This Court, other courts, and the political process are available to correct any experiments in criminal procedure that prove fundamentally unfair to defendants. That is not what is being done today: instead, and quite without reason, the Court has chosen to impose upon every State one means of trying criminal cases; it is a

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[51] The example is taken from Day, Petty Magistrates' Courts in Connecticut, 17 J. Crim. L. and Crimin., 343, 346–347, cited in Kalven and Zeisel, *supra*, at 17. The point is that the "huge proportion" of criminal charges for which jury trial has not been available in America, Puttkamer, Administration of Criminal Law 87–88, is increased by the judicious action of weary prosecutors.

good means, but it is not the only fair means, and it is not demonstrably better than the alternatives States might devise.

I would affirm the judgment of the Supreme Court of Louisiana.